Supreme

Filed

THE UNITED STATES,

Appellant,

vs.

THE OREGON AND CALIFORNIA RAILROAD COMPANY
JOHN A. [illegible] AND THOMAS J. [illegible],

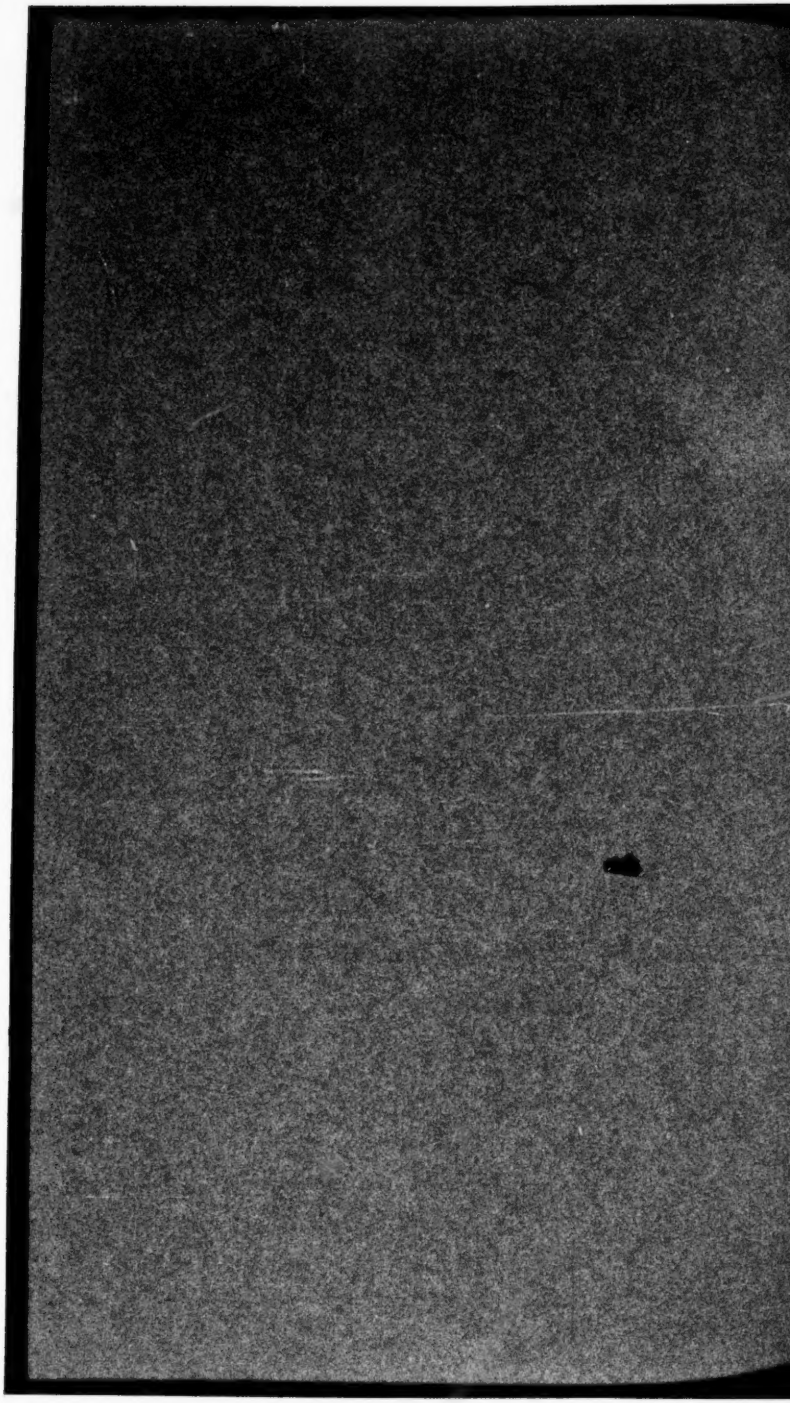
Appellees.

Appeal from Decree Second Circuit Court of Appeals 9th
Judicial Circuit.

BRIEF FOR THE APPELLEES.

JOSEPH H. CHOATE,
LEWIS S. DAWSON,
CHARLES H. TWEED,
Of Counsel for Appellees.

[illegible] Printing, Binding and Lithographing Co., N. Y.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 52.

THE UNITED STATES,
Appellant,

AGAINST

THE OREGON AND CALIFORNIA RAILROAD COMPANY, JOHN A. HURLBURT and THOMAS L. EVANS,
Appellees.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE APPELLEES.

Statement of Case.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Ninth Circuit, rendered on October 19, 1896, reversing the decree of the Circuit Court for the District of Oregon and remanding the cause thereto with

directions to the Court below to dismiss the bill (Record, p. 184).

The suit was brought by the United States in February, 1893, in the Circuit Court for the District of Oregon, to obtain a decree for the cancellation of patents issued by the United States to the Oregon and California Railroad Company conveying the lands described in the bill of complaint, and for the cancellation of the instruments purporting to convey the title derived through such patents.

The decree of the Circuit Court for the District of Oregon, rendered on September 9, 1895, which was reversed by the Circuit Court of Appeals, had decreed the cancellation of the several patents described in the bill, and issued by the United States to the Oregon and California Railroad Company on May 9, 1871, July 12, 1871, June 22, 1871, and June 18, 1877, in so far as they purported to convey title to the lands described in the bill, and had adjudged such patents to be null and void, and had decreed that the warranty deed executed February 26, 1880, by the said Railroad Company to the defendant Hurlburt, for a portion of the lands embraced in the bill, be canceled and decreed null and void, and that the

several deeds from the said Railroad Company and the deeds thereunder by which the title of certain other portions of the lands embraced in the bill was finally lodged in the defendant Evans should be canceled and adjudged to be null and void (Record, p. 63).

The lands in suit are situated in the State of Oregon, southeasterly from the City of Portland, and are within the limits of the grant made by the Act of Congress of July 25, 1866 (14 Statutes, 239), to aid in the construction of a railroad from Portland to the southern boundary of the State of Oregon.

The Oregon and California Act.

The first section of the act authorized the construction of a railroad and telegraph line within the State of Oregon, beginning at the City of Portland, in Oregon, and running thence southerly through the Willamette, Umpqua, and Rogue River Valleys to the southern boundary of Oregon.

The granting clause of the act was in Section 2 as follows:

> "Sec. 2. *And be it further enacted*, that "there be, and hereby is, granted to the said

"Companies, their successors and assigns,
"* * * every alternate section of public land,
"not mineral, designated by odd numbers,
"to the amount of twenty alternate sections
"per mile (ten on each side) of said railroad
"line; and when any of said alternate sections
"or parts of sections shall be found to have
"been granted, sold, reserved, occupied by
"homestead settlers, pre-empted, or other-
"wise disposed of, other lands, designated as
"aforesaid, shall be selected by said com-
"panies in lieu thereof, under the direction
"of the Secretary of the Interior, in alter-
"nate sections designated by odd numbers as
"aforesaid, nearest to and not more than ten
"miles beyond the limits of said first-named
"alternate sections; and as soon as the said
"companies, or either of them, shall file in the
"office of the Secretary of the Interior a map
"of the survey of said railroad, or any por-
"tion thereof, not less than sixty continuous
"miles from either terminus, the Secretary
"of the Interior shall withdraw from sale
"public lands herein granted on each side of
"said railroad, so far as located and within
"the limits before specified."

Section 4 of the act provided that upon the completion of each section of twenty or more consecutive miles of road the President should appoint Commissioners to examine the same, and, upon the report of the Commissioners of the com-

pletion and equipment thereof, patents should issue to the Company for the lands therein granted, to the extent of, and coterminous with, the completed section of the road, and so upon the completion of each succeeding section of twenty miles or more.

The lands in suit are opposite to and coterminous with the first two sections or forty miles of road so completed by the Company south from Portland.

The Bill.

The bill admits (Record, p. 13) that under the legislation of Oregon the Oregon Central Railroad Company was designated as the beneficiary of the grant, and became the corporation entitled to all the benefits and subject to all the obligations of said Act of Congress, and that the Oregon and California Railroad Company became the successor and assign of the said Oregon Central Railroad Company.

It admits (Record, pp. 13, 14) that, on the 29th day of October, 1869, the Oregon Central, having duly filed its acceptance of the grant in all respects in accordance with law, filed with the Secretary of

the Interior its map of definite location opposite the lands in question in this suit; that such map of definite location was accepted by the Secretary of the Interior on January 29, 1870, and that the lands above described were, in February, 1870, withdrawn in pursuance of orders filed by the Secretary of the Interior; that the railroad of the said Company was duly constructed opposite these lands within the time limited by law for the completion of the said portion of said road; that, the first twenty consecutive miles of this railroad next south of Portland having been completed, Commissioners to examine the same were appointed by the President, and, on December 31, 1869, made due report of the completion and equipment of said twenty miles, as required by the act, and on January 29, 1870, the President accepted and approved the same and ordered patents to issue to the Company for the lands in granted limits coterminous with said completed road, and in like manner on September 28, 1870, report was duly made to the President of the due completion and equipment of the second section of twenty miles (next south of the first section above referred to), and such report was duly accepted and approved, and patents

were ordered to issue to the Company for land in granted or place limits coterminous with said second section, and that these forty miles taken together covered the line of said Company's railroad opposite the lands described in the bill and some distance southwardly therefrom.

The bill further admits (Record, p. 14) the issue of patents in the usual form, which included the lands embraced and described in the bill, and that the entire line of railroad of the Oregon and California Company has been fully constructed and been duly accepted by the President, and has been continuously and still is operated by the Company; but the bill claims that the ministerial officers of the United States acted erroneously and contrary to law in issuing the patents for the lands described in the bill, and that they are void and should be so declared.

The bill further shows (Record, p. 15) that the defendant Company on February 7, 1880, sold to the defendant Hurlburt a part of the lands covered by one of the patents, and by warranty deed dated February 26, 1880, conveyed the same to him, and that he thereupon went into possession of the lands so sold and conveyed to him and made valuable and permanent im-

provements thereon, and remained in possession thereof to the time of filing the bill; and that the defendant Thomas L. Evans similarly acquired through sale by the Company and warranty deeds of conveyance another portion of the lands in suit covered by another of said patents. The bill concedes that the lands so conveyed to said Hurlburt and Evans were purchased and granted from the Oregon and California Railroad Company in good faith for value, in reliance upon the apparent title to the lands under the patents from the United States to the Company, and without actual notice of any defect in the title of the Company to the lands, but charges that the purchasers were subject to constructive notice of the Acts of Congress, and that under those Acts no title could pass to them.

The bill plainly concedes that under the land grant of July 25, 1866, above referred to, and the proceedings thereunder, if they stood alone, good title was acquired by the defendant Company, and its grantees, but the bill seeks to invalidate the grant by reason of the grant to the Northern Pacific Railroad Company, which is alleged to have covered the lands described in the bill.

To this end it sets forth the Act of Congress creating the Northern Pacific Railroad Company, and granting lands to it entitled "An Act "granting Lands to aid in the Construction of a "Railroad and Telegraph Line from Lake Superior "to Puget's Sound, on the Pacific Coast, by "the Northern Route," approved July 2, 1864, and the subsequent Joint Resolution of Congress entitled "A Resolution authorizing the Northern "Pacific Railroad Company to issue its Bonds for "the Construction of its Road and to secure the "same by Mortgage, and for other Purposes," approved May 31, 1870, which have already so frequently been under consideration by this Court.

For greater perspicuity the material portions of the Northern Pacific Act, and of the Joint Resolution affecting the same, are here set forth.

The Northern Pacific Act of 1864 and Joint Resolution of 1870.

Section 1 of the Act of 1864 creates the corporation and authorizes it to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line with the appurtenances—namely:

"Beginning at a point on Lake Superior,

" in the State of Minnesota or Wisconsin;
" thence westerly by the most eligible rail-
" road route, as shall be determined by said
" company, within the territory of the United
" States, on a line north of the forty-fifth de-
" gree of latitude to some point on Puget's
" Sound, *with a branch, via the valley of the*
" *Columbia River, to a point at or near*
" *Portland, in the State of Oregon, leaving*
" *the main trunk line at the most suitable*
" *place, not more than three hundred miles*
" *from its western terminus.*"

Section 3 of the act provided :

" That there be, and hereby is, granted
" * * * every alternate section of public
" land, not mineral, designated by odd num-
" bers, to the amount of twenty alternate
" sections per mile, on each side of said rail-
" road line, as said company may adopt,
" through the territories of the United States,
" and ten alternate sections of land per mile
" on each side of said railroad whenever it
" passes through any state, and whenever on
" the line thereof, the United States have
" full title, not reserved, sold, granted, or
" otherwise appropriated, and free from pre-
" emption, or other claims or rights, *at the*
" *time the line of said road is definitely fixed,*
" *and a plat thereof filed in the office of the*
" *commissioner of the general land office;*
" and whenever, prior to said time, any of
" said sections or parts of sections shall have

" been granted, sold, reserved, occupied by " homestead settlers, or preëmpted, or other- " wise disposed of, other lands shall be " selected by said company in lieu thereof, " under the direction of the Secretary of the " Interior, in alternate sections, and desig- " nated by odd numbers, not more than ten " miles beyond the limits of said alternate " sections."

Section 6 of the act provided :

" That the President of the United States " shall cause the lands to be surveyed for " forty miles in width on both sides of the " entire line of said road, after the general " route shall be fixed, and as fast as may be " required by the construction of said rail- " road; and the odd sections of land hereby " granted shall not be liable to sale, or entry, " or preëmption before or after they are sur- " veyed, except by said company, as provided " in this act."

By Section 8 of the Act the grant was conditioned upon the Company's commencing and completing the whole road within the time prescribed by the act.

On April 10, 1869, Congress passed a Joint Resolution (16 Statutes, page 57) authorizing the Northern Pacific Company to extend its branch line from a point at or near Portland, Oregon, to

some suitable point on Puget Sound, to be determined by the Company, and also to connect the same with its main line west of the Cascade Mountains in the Territory of Washington, but without any additional land grant. But this concession seems to have never been accepted by the Company, and at any rate is immaterial to the present controversy.

The Northern Pacific Railroad Company did not in fact begin the construction of its road until after the passage by Congress on the 31st of May, 1870, of the following Joint Resolution (16 Statutes, page 378):

> " *Resolved by the Senate and House of* " *Representatives of the United States of* " *America in Congress assembled*, That the " Northern Pacific Railroad Company be, and " hereby is, authorized to issue its bonds " to aid in the construction and equipment " of its road, and to secure the same by " mortgage on its property and rights of " property of all kinds and descriptions, " real, personal, and mixed, including its " franchise as a corporation; and, as proof " and notice of its legal execution and " effectual delivery, said mortgage shall " be filed and recorded in the office " of the Secretary of the Interior; and also " to locate and construct, under the provi-

" sions and with the privileges, grants, and
" duties provided for in its act of incorpora-
" tion, *its main road to some point on Puget*
" *Sound, via the valley of the Columbia*
" *river*, with the right to locate and construct
" *its branch from some convenient point on*
" *its main trunk line across the Cascade*
" *Mountains to Puget Sound;* and in the
" event of there not being *in any State or*
" *Territory in which said main line or branch*
" *may be located*, at the time of the final
" location thereof, the amount of lands per
" mile granted by Congress to said company,
" within the limits prescribed by its charter,
" then said company shall be entitled, under
" the directions of the Secretary of the
" Interior, to receive so many sections of land
" belonging to the United States, and desig-
" nated by odd numbers, *in such State or*
" *Territory*, within ten miles on each side of
" said road, beyond the limits prescribed in
" said charter, as will make up such deficiency,
" on said main line or branch, except mineral
" and other lands as excepted in the charter
" of said company of eighteen hundred and
" sixty-four, *to the amount of the lands that*
" *have been granted, sold, reserved, occupied*
" *by homestead settlers, pre-empted, or other-*
" *wise disposed of subsequent to the passage*
" *of the act of July two, eighteen hundred*
" *and sixty-four*. And that twenty-five miles
" of said main line between its western ter-
" minus and the City of Portland, in the

" State of Oregon, shall be completed by the
" first day of January, anno Domini eighteen
" hundred and seventy-two, and forty miles
" of the remaining portion thereof each
" year thereafter, until the whole shall be
" completed between said points: *Provided*,
" that all lands hereby granted to said com-
" pany which shall not be sold or disposed of
" or remain subject to the mortgage by this
" act authorized, at the expiration of five
" years after the completion of the entire road,
" shall be subject to settlement and pre-
" emption like other lands, at a price to be
" paid to said company not exceeding two
" dollars and fifty cents per acre; and if the
" mortgage hereby authorized shall at any
" time be enforced by foreclosure or other
" legal proceeding, or the mortgaged lands
" hereby granted, or any of them, be sold by
" the trustees to whom such mortgage may
" be executed, either at its maturity or for any
" failure or default of said company under
" the terms thereof, such lands shall be sold
" at public sale, at places within the States
" and Territories in which they shall be sit-
" uate, after not less than sixty days' previ-
" ous notice, in single sections or subdivisions
" thereof, to the highest and best bidder:
" *Provided further*, That in the construction
" of the said railroad, American iron or steel
" only shall be used, the same to be manu-
" factured from American ores exclusively.

" SEC. 2. *And be it further resolved*, That

" Congress may at any time alter or amend
" this joint resolution, having due regard to
" the rights of said company, and any other
" parties."

The Bill sets forth (pp. 2–3) the proceedings of the Northern Pacific Railroad Company under the Act of 1864, and the Joint Resolution of 1870, so far as deemed material to this controversy as follows:

The Perham Map.

This map is reproduced in the record and marked 336.

[It will be remembered that, at the time when this map was presented to the Secretary, the Act of 1864, which authorized the construction of the main line "to some point on Puget's Sound, *with* " *a branch via the valley of the Columbia River* " *to a point at or near Portland*," was the only act in force in favor of the Northern Pacific Railroad Company].

The map was transmitted by Josiah Perham, then President of the Company, to the then Secretary of the Interior, March 6, 1865, with a letter of that date, a copy of which is as follows (Record, p. 81):

"WASHINGTON, D. C., 6 March, 1865.

"HON. J. P. USHER, Secretary of the In-
" terior:

"SIR—Under authority from the board of
" directors of the Northern Pacific Railroad
" Company, I have designated on the accom-
" panying map in red ink the general line of
" their railroad from a point on Lake Superior,
" in the State of Wisconsin, to a point on
" Puget Sound, in Washington Territory, via
" the Columbia River, adopted by said com-
" pany as the line of said railroad, subject only
" to such variations as may be found necessary
" after more specific surveys, and I respectfully
" ask that the same may be filed in the office
" of the Commissioner of the General Land
" Office, together with a copy of the charter
" and organization of said company, and that
" under your directions the lands granted to
" said company may be marked and with-
" drawn from sale in conformity to law.

" I am, respectfully, your ob't serv't,

" JOSIAH PERHAM,

" Pres't N. P. R. R. Company."

On March 9, 1865, the then Secretary of the Interior transmitted this map to the then Commissioner of the General Land Office (Exhibit D, Record, p. 82):

On June 22, 1865, the then Commissioner of the General Land Office declined to order a with-

drawal upon the Perham Map and returned it to the Secretary of the Interior (Exhibit E, Record, pp. 83–4):

[This letter was endorsed in pencil as follows: "Sec'y sustains Commr.'s refusal." See Record, p. 84, at foot.]

The Attitude of the Northern Pacific Company Between the Rejection of the Perham Map and the Passage of the Joint Resolution of 1870.

The bill further alleges that on April 27, 1867, E. F. Johnson, chief engineer of the Northern Pacific Railroad Company, addressed to the Commissioner of the Land Office a letter, stating that he was directed by the company, as their engineer, to commence at the earliest practicable moment the survey and location of the line of their road in Wisconsin and Minnesota. After referring to the terms of the charter of the company requiring the eastern terminus of the road to be at a point on Lake Superior within the limits either of Wisconsin or Minnesota, the letter proceeded (Record, p. 165):

"Already, as I am informed, two railroad "companies, having land grants from the

" Government, have located their lines con-
" necting with Lake Superior near its west-
" ern extremity. In order that the line of
" the Northern Pacific Railroad Company
" may be so located as to interfere as little as
" possible with other lines, and secure to the
" company its quota of land under the grant
" made to it, it is desirable to know what
" lands within the limits prescribed in its
" charter have been disposed of either to rail-
" way companies or otherwise, including
" such as have been withdrawn or reserved
" to the Indians.

" It is not probable that the terminus of
" the Northern Pacific Railroad, if placed on
" the northern side of the lake, will be es-
" tablished further east than Buchanan, and
" if upon the south side, farther east than
" the head of Chequamigon Bay. Should
" this latter point be selected, the line, on
" leaving the lake, will probably incline
" somewhat to the south, not, however, more
" than about ten miles, and thence it will run
" by a nearly direct course to near Crow
" Wing or Fort Ripley, on the Mississippi,
" and thence to near Breckenridge on the
" Red River.

" Wherever the terminus may be upon
" the lake, whether at either of the points
" named or between them, the line will not,
" I think, cross the Independent meridian
" which forms in part the boundary between
" Wisconsin and Minnesota farther north

" than twenty miles north of the fifth cor-
" rection line in Minnesota, or further south
" than twenty miles south of the same line."

Mr. Johnson encloses a map on which he asks the Commissioner to indicate the limits of the land granted, which would inure to the company in the State of Minnesota by either proposed route from the lake, with which request the Commissioner complies by letter dated May 8, 1867 (see pp. 165–66 of Record and Map Numbered 342).

The bill further refers to a letter of J. Gregory Smith, President of the Company, to Jay Cooke, dated February 17, 1870 (transmitted on the following day by Mr. H. D. Cooke on behalf of the Company to the Secretary of the Interior), and the Secretary's reply thereto dated February 21, 1870, which letters appear on pages 85 and 86 of the record.

The letter of President Smith requests Cooke to impress upon the Secretary the great importance of protecting the Northern Pacific in the matter of their lands while the surveys are being made; states that organized bands of speculators are working in advance of their surveying parties, entering and taking up the most valuable of their lands and thus depriving them of the only means left for building their road; asking

for the withdrawal from public entry, except in cases of actual settlers under the homestead laws, of all the lands in Minnesota north of the parallel, say of St. Cloud, about 47 or 46¼, say for a period of ninety days, which would enable the company to complete its surveys and file its map in the department. He adds (Record, p. 85):

> "Whether any precedent exists for the "method we propose, I do not know; but the "manifest equity of our request I am sure "none can deny. Nor can any injury result "to any legitimate interest. As to an honest "and actual settler under the homestead we "do not seek to interpose any obstacle, "but we do think we have a right to ask pro-"tection as against parties whose only object "is to plunder us."

The Secretary's letter in reply (Record, p. 86) says:

> "In reply I have to state that upon a map "being filed showing the designated route of "the Northern Pacific Railroad from the point "on Lake Superior, fixed upon as the 'begin-"ning of the road,' to the western boundary "of Minnesota, an order will be issued to "the Commissioner of the General Land "Office to withdraw temporarily the odd "sections not sold, reserved, &c., for twenty "miles on each side thereof."

"The company's surveys must have pro-
"gressed so far that a route can be designated
"which will vary but little from what it will
"be when definitely located. Such a with-
"drawal will prevent the granted sections
"being entered and will accomplish the object
"Mr. Smith has in view. This is all the De-
"partment can do under the circumstances."

No other proceedings were taken by the Northern Pacific Railroad Company prior to the passage of the Joint Resolution of May 31, 1870, which authorized the Company "to locate and construct "* * * *its main road to some point on Puget* "*Sound via the valley of the Columbia River*, "with the right to locate and construct its branch "from some convenient point on its main trunk "line across the Cascade Mountains to Puget "Sound."

THE PROCEEDINGS OF THE NORTHERN PACIFIC COMPANY AFTER THE PASSAGE OF THE JOINT RESOLUTION OF 1870.

The Bill further alleges that on August 4, 1870, two maps of general route were presented to the then Secretary of the Interior by Johnson, chief engineer of the Northern Pacific, copies of which maps appear in the record, being numbered 333

and 334. Copies of the affidavit and certificate accompanying these maps are attached to the Bill and printed (Record, pp. 87 to 90).

The map numbered 333 is on its face entitled "Map showing the location of the Northern "Pacific Railroad from its initial point on Puget "Sound via the valley of the Columbia River to "the mouth of the Walla Walla river." The affidavit accompanying the map refers to the surveys and explorations made, and the information obtained as "sufficient to enable the said Company to "determine *approximately* and by reference to "appropriate landmarks the proper position for "the line of their said road on those portions, *with a* "*view to the withdrawal from market or from* "*settlement* of the lands granted to the said Com- "pany on either side of their said road" (Record, p. 87), and refers to the line from Puget Sound to a point opposite the mouth of the Walla Walla River as one of the portions of the railroad, "the proper "location of which has *thus* been ascertained."

The certificate of the President of the Railroad Company certifies that "certain portions of the 'line or route for said road were so far definitely "fixed by resolution of the Board of Directors of "said Company on the eighth day of July, A. D.

" 1870, as to make it the duty of the President
' of the said Company to request the Honorable
" the Secretary of the Interior to withdraw or
" withhold from sale and settlement the public
" lands to which said company are entitled on
" either side of the lands [line] of their road so
" described as aforesaid in the certificate of their
" engineer in chief," and adds: "They, therefore,
" respectfully ask that their interests may be pro-
" tected so far as they can be by a withdrawal of
" lands, as above set forth.

"Such protection, it is believed, is in strict
" accordance with the intention of Congress in
" granting lands to the Company for the con-
" struction of their road, and will save the Com-
" pany from a serious loss or diminution in
" the value of the grant consequent upon the
" delay necessary in making the surveys *for filing*
" *a location in the usual form.*"

[The resolution adopted July 8, 1870, referred to in the foregoing certificate, is set forth at page 130 of the record, and is as follows:

" Resolved, That the President cause a *prelim-*
" *inary location* with a map of the main road
" of the Northern Pacific Railroad Company, com-
" mencing at Whatcom on Puget Sound, thence

" running southerly on the easterly side of the " said sound to Portland, in Oregon, and from the " point where the said road crosses the Columbia " River, and on the north side thereof, and by the " valley of the said river to the mouth of the Snake " River, to be filed in the office of the Secretary of " the Department of the Interior, at Washington, " at as early a day as practicable. Also to cause a " like preliminary location, with a map of the " main line, from the point on the Red River " where the said road may cross the said river; " running thence to the Missouri River at the " point of intersection of the Yellowstone with " the Missouri, and thence up the valley of the " Yellowstone to a point in the Rocky Moun- " tains, which shall be common to a line to be " run either down the valley of the Salmon River " or the Clearwater River, and to file said map " with the Secretary of the Interior at Wash- " ington."]

The map numbered 333 showed a line extending from near the International Boundary line southerly along the easterly side of Puget Sound or of the chain of inland tide waters connected with the Straits of Juan de Fuca to their southern extremity; thence southerly to the Colum-

bia River and along the easterly and northerly or right bank of that river to a point opposite to the mouth of the Walla Walla River in said Territory. The other map (No. 334), filed on the same date, indicated the general route of the Northern Pacific from Lake Superior to the same, or substantially the same, point on the Columbia River, near the mouth of the Walla Walla River. These maps show at a glance that they are merely maps of preliminary route, and make no pretense of being maps of definite location.

On August 13, 1870, the Secretary acknowledges to the President of the Company the receipt from the Chief Engineer of the "two "maps showing the general route of the Northern "Pacific Railroad, commencing at the mouth of "the Montreal River in Wisconsin and termi-"nating at the international boundary line on "Simiahmoo Bay in Washington Territory." He denies the right of the Company to cover and control all the waters connected with Puget Sound, and states that he has directed the Commissioner to withdraw the odd-numbered sections within twenty miles on each side of the route in Wisconsin and Minnesota and in Washington Territory only to withdraw such sections south of the Town of Steilacoom (Record, pp. 90-91).

The direction to the Commissioner bearing the same date, August 13, 1870, is printed at page 79, and instructs him to "direct the proper local "land officers in the States of Wisconsin and "Minnesota to withhold from sale, pre-emption, "homestead and other disposal the odd-numbered "sections not sold, reserved, and to which prior "rights have not attached, within twenty miles on "each side of the route, and in like manner "direct those officers *in Washington Territory* "to withhold such odd-numbered sections as "lie south of Town of Steilacoom;" the withdrawal to "take effect from the receipt of "the order at the local office."

The Oregon withdrawal order is printed at page 80 of the Record and was to take effect upon its receipt by the Register and Receiver, which took place October 15, 1870.

The Bill alleges that the lands described therein were odd-numbered sections or parts of odd-numbered sections of public lands not mineral within the place limits of the proposed line of railroad as designated by the map numbered 333, and within the limits of the withdrawal ordered.

[The Northern Pacific never filed any map of

definite location of the route from the mouth of Walla Walla River via the Columbia River to any point at or near Portland, and never built any portion of the road on that route.]

The Northern Pacific Forfeiture Act.

The bill further shows—to complete the alleged title of the United States to the lands in question—that by an Act of Congress entitled "An Act to for-"feit certain lands heretofore granted for the pur-"pose of aiding the construction of railroads, and "other purposes," approved September 29, 1890, the United States resumed title to and restored to the public domain all lands theretofore granted to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not then completed and in operation, for the construction or benefit of which such lands were granted; and the bill avers that the Northern Pacific Railroad Company had not, at the date of the passage of said bill, completed, and was not then operating, any portion of its said railroad opposite to or coterminous with any of the lands described in the bill, and said Company, at the time of filing the bill, had not yet built and was not building or

operating any railroad opposite to or coterminous with said lands.

Amendment to Bill.

By amendment to the bill (Record, p. 20) it further appeared that "no other maps of route or "location of the line of the proposed railroad "of said Northern Pacific Railroad Company "between Wallula and Portland were ever filed, "either with the Secretary of the Interior or the "Commissioner of the General Land Office," and that there were no other withdrawals in Oregon upon the portion of the Northern Pacific Railroad referred to except that based on the letter of the Secretary of August 13, 1870 (Record, p. 79), and that based on the letter of the Secretary of October 27, 1870 (Record, p. 80), which ordered the withdrawal increased to forty miles on each side of the route and that no withdrawal of indemnity lands was ever ordered or made on account of said line of road between the points named. Appended to this amendment to the bill (Record, p. 78) was the certificate of the Commissioner of the General Land Office to the effect that no map of the definite location of the Northern Pacific Railroad between Wallula, State of

Washington, and Portland, State of Oregon, was ever filed in his office, nor was any withdrawal of indemnity lands ever made on account of said railroad between said points.

PROCEEDINGS UPON DEMURRER TO THE BILL.

The defendants demurred to the bill as amended, and, after argument, the Circuit Judge, GILBERT, J., overruled the demurrer, upon the mistaken assumption that the map of August, 1870 (No. 333), was a map of definite location; that thereby the grant made by the Northern Pacific Act attached to the lands in question, and so attached as of the date of the original Act of 1864, so that when the subsequent Act in favor of the defendants was passed in 1866 these lands were already granted to the Northern Pacific, and the grant to the defendants did not include or cover them.

The gist of the opinion of the Circuit Judge appears on pages 28 and 29 of the Record, as follows:

> "On the 13th day of August, 1870, the
> "company filed a second map, designating
> "the main line by way of the north bank of
> "the Columbia River, as in the Perham

" map. *It was a map of definite location,*
" *and thereupon the Secretary of the In-*
" *terior formally withdrew the lands and*
" *issued his notice. Whatever objection*
" *may be urged to the Perham map, it*
" *must be conceded that the map of*
" *August* 13, 1870, *in all respects com-*
" *plied with the act, and that then, if not*
" *before, the line of the Northern Pacific*
" *road became definite and fixed.*

" In the view I take of the law it would
" make no difference with the rights of the
" parties to this suit if the Perham map had
" not been filed. The grant to the Northern
" Pacific being prior in date to the grant to
" the Oregon and California, and the reser-
" vation of granted lands from the first grant
" being held not to refer to lands subse-
" quently granted in aid of another road, the
" first grant remained prior and superior to
" the second, and there could be no reversal
" of the order of their priority, resulting
" either from the fact that the grantee, un-
" der the junior grant, filed its map of
" definite location and constructed a portion
" of its road before any map was filed of the
" line of road under the older grant, or from
" the further fact that in the final construc-
" tion of the Northern Pacific road no por-
" tion thereof was established upon the line
" either of the Perham map or the map of
" 1870. Congress did not offer these lands
" to the competition of the two companies,

" and it was not the intention that the more " diligent of the two corporations should " secure them.

" I hold that the failure of the Northern " Pacific to construct its road by way of the " Columbia River valley, the forfeiture of " its grant therefor declared by Congress in " 1890, and the construction by the Oregon " and California Company of its road in apt " time under its grant of July, 1866, are all " matters foreign to the question under con- " sideration. The fact remains that the lands " in controversy were granted lands at the " time the grant to the Oregon and California " Company took effect. They were, there- " fore, not the subject of the grant to that " company. When that grant was made " the beneficiary thereof had full notice of " the prior grant, and had reason to under- " stand that the lands so devoted to aid the " construction of the other road were not " within the purview of its own grant, and " were not promised it by the United States."

The only comment which we care to make upon this opinion is that it wholly ignores the true character of the map of August, 1870, as explicitly shown by this Bill, the amendment to the Bill, and all the exhibits thereto, which clearly show that the map was and purported to be only a map of general route.

The Answer to the Bill.

Time having been allowed the defendants to answer the bill, they duly filed their answer (p. 33 of the Record), June 25, 1894.

They answer that the Perham map was never accepted by the Secretary or the Commissioner, but, on the contrary, for good and sufficient cause was disapproved and rejected by them both. That it was wholly ineffective as a map of general route or definite location, or for any purpose whatsoever, and that, after its rejection, it was not regarded or treated by the Company or by the Secretary or Commissioner as a valid map for any purpose, and that no subsequent action was ever had or taken as to said map either by the Company or the public authorities.

They further answer that the two maps of general route of August 4, 1870, never became or were maps of definite location or anything more than maps of general route, and they deny that any map of definite location of the Northern Pacific Railroad between Wallula and Portland or its vicinity, or opposite the lands in controversy in this suit, or any of them, was ever presented to or filed with the Secretary of the Interior or the Commissioner of the General Land Office,

and they deny that any withdrawal of indemnity lands was ever made on account of said railroad or railroad line opposite the lands in question.

They further deny that all the lands in controversy in this suit were within the place limits of the proposed line of the Northern Pacific as designated by the maps of August 4, 1870, or that all of such lands were within the limits of any withdrawal duly or properly ordered in respect thereof, claiming that the Northern Pacific never became entitled to any withdrawal of any lands within the State of Oregon opposite the line shown on the maps of August 4, 1870, which were distant more than twenty miles from the proposed line of railroad as indicated upon said map, and therefore deny that any lands in controversy in this suit which were distant more than twenty miles from the said proposed lines of railroad could be within any place limits of said railroad, or could be lawfully withdrawn in respect thereof, and they further aver that the patents to the Oregon and California Railroad Company under its claim thereto, under the Act of 1866, included about fifty-six thousand acres of land distant more than twenty miles from said line of general route of the Northern Pacific.

They insist upon the validity of their patents and of the title of Hurlburt and Evans under the Oregon and California Company's deeds, by virtue of which they hold.

They further allege that, besides the land sold to Hurlburt and Evans, the Company had from time to time before complainant's demand for reconveyance of any of the lands involved in the suit sold to divers other persons and parties, as stated in the Schedule annexed to the answer and printed at pages 36 to 49 of the record, portions of the lands in controversy in the suit, and that these had been purchased in good faith for full and valuable consideration, without notice or knowledge of any alleged defect in the Company's title to the lands or of any claim of the United States in respect thereto, and that such purchasers or their transferees or a large portion thereof had entered into actual possession of the lands, and remained in possession thereof at the date of answer and had made valuable and permanent improvements thereon, and aver that all such sales had been made prior to the time of the assertion of complainant's claim that the lands had not passed to the Company under its grant.

The Schedule shows that 61,336.23 acres of

the land involved in the suit had been so sold by the Company.

The Evidence.

Evidence was taken to show that although the best line for a railroad from a point three hundred miles east of Puget Sound to a terminus at or near Portland would be on the banks of the Columbia as nearly as practicable, yet that there were other lines than the one down the immediate bank of the Columbia from such point three hundred miles east of Puget Sound to Portland, which would be *within the valley of the Columbia*, and that while a direct road down the gorge in which the Columbia River largely runs from Wallula to the neighborhood of Portland would be liable to damage and destruction by frequent overflows, these other lines would not (Record, pp. 122–128).

It further appears in evidence (Record, p. 129) that simultaneously with the filing of the maps of general route on August 4, 1870, the engineer-in-chief of the Northern Pacific expressly notified the Secretary of the Interior that it was probable the Northern Pacific might wish to vary the location of a portion of their line situated between the mouth of Boulder Creek on Jefferson

River, in Montana, and the Columbia River, and that material changes might have to be made because of the impracticability of the route indicated.

The resolutions of the Board of Directors of the Northern Pacific Railroad Company were put in evidence, in respect to the maps of general route of August 4, 1870, whereby it appeared that the President was directed to cause a *preliminary location* with a map of the main road of the Northern Pacific from Puget Sound via the Columbia River to the mouth of Snake River, to be filed in the office of the Secretary at as early a date as practicable; also to cause a like preliminary location with the map of the main line in other parts of the route to be filed (Record, p. 130); *vide supra*, p. 23-24.

It further appears by the proceedings of the Northern Pacific Board of Directors of October 26, 1870 (Record, pp. 130–131), that the location of the line from Lake Superior to the point in Washington Territory opposite the mouth of the Walla Walla River was laid down on the map as an approximate line only with the approbation of the Secretary of the Interior, and with the understanding that, as the located line was

made from actual surveys, the Company might have the privilege of changing the line so as to conform to the actual location, and hold the lands granted according to such final survey, and that with this understanding the map with the line traced upon it was filed and the request made that the lands should be withdrawn by the Interior Department; that subsequent to the filing of the map, and before any action was taken by the Department, the engineer-in-chief having received intelligence that the route proved impracticable in the valley of the Salmon River, notified the Secretary that so much of said line in Montana and Idaho as pertained to the Salmon River route was withdrawn, and requested no action by the department thereon, and that afterwards notice was received by the President of the Company from the Secretary that the Company's map was received and filed and that the lands to the extent of twenty sections per mile in Minnesota, Oregon and Washington Territory were withdrawn up to Seattle.

It further appeared by letters of the Secretary put in evidence that on October 12, 1870, the Northern Pacific had altered its road from the map of August, 1870, in the State of Minnesota (Record, pp. 133 to 136).

An affidavit of the President of the Company was further introduced (Record, pp. 132-133) giving the history of the map of August, 1870; that the map was filed with the express understanding between the Secretary of the Interior and the Company that the line designated upon the map was an approximate line only of the map of general route, and that the same might be changed, and that it was changed accordingly, and portions of it were withdrawn and a new map of general route substituted February 21, 1872.

The papers relating to the substitution of February 21, 1872, appear at pages 137–140 of the record.

It was shown that the Interior Department had always disregarded the Perham Map from the time of its rejection in 1865, and had never treated the Northern Pacific Maps of 1870 as anything more than maps of general route.

A report of the Commissioner of the General Land Office to Secretary Schurz, which was transmitted by the latter to the United States Senate in 1880 in reply to an inquiry in respect to proceedings under the Northern Pacific grant, was put in evidence (Record, pp. 156 to 163). From this it appears (p. 160) that the first map of gen-

eral route for this portion of the road was the map accepted August 13, 1870, and upon which withdrawal was ordered September 20, 1870; and numerous subsequent changes in general route are referred to and described. Among the maps attached to this report are the map numbered 329, which shows the proposed line of 1870, the amendment of February, 1872, the constructed line from Kalama to Tacoma of 1874, and the general route map for the branch line of August, 1873, with the amendments thereto of 1876 and 1879.

There was also put in evidence the material portion of the official Interior Department statement concerning land grants prepared in 1888 by direction of the Secretary of the Interior, showing the general route maps of the portion of the Northern Pacific Railroad between the Eastern boundary of Washington Territory via the valley of the Columbia River and the international boundary to have been filed August 13, 1870, and withdrawal to have been ordered September 20, 1870, November 21, 1870, and at various dates in 1872; also showing that there was never any definite location of this portion of the line; and in the column of remarks referring to the "Road "still uncompleted between Wallula Junction,

" Wash., and Portland, Oregon. Company uses " road of Oregon Rwy and Navigation Co. be- " tween said points " (Record, folder 347).

It may perhaps be suggested that the proofs as to the character of the maps of August, 1870, is unnecessarily extended, but this no doubt resulted from the fact that in passing upon the demurrer the Circuit Judge had, notwithstanding the allegations of the bill upon the subject, chosen to assume that these maps were maps of definite location and had based his decision upon that assumption.

The Material Dates.

The dates material to the controversy, stated in their chronological order, would seem to be as follows:

July 2, 1864. Original Northern Pacific Act passed, authorizing main line to Puget's Sound and branch line to Portland.

March 6, 1865. Perham Map transmitted to Secretary of Interior. (This map was never accepted, but was rejected by the Commissioner of the General Land Office June 22, 1865, in which rejection thereof the Secretary of the Interior concurred.)

July 25, 1866. Oregon Company's Granting Act passed.

October 29, 1869. Oregon Company's map of definite location filed opposite all lands involved in suit.

December 31, 1869. Commissioners appointed to examine Oregon line filed report of construction of first twenty miles.

January 29, 1870. Report of Commissioners accepted by President and patents ordered to issue for lands coterminous with completed road.

January 29, 1870. Oregon Company's map of definite location accepted by Secretary of the Interior.

January 31, 1870. Withdrawal ordered by Commissioner of General Land Office on Oregon Company's map of definite location.

February 16, 1870. Lands withdrawn by local officers for Oregon Company in accordance with its map of definite location.

May 31, 1870. Northern Pacific Joint Resolution passed, authorizing construction of main line to Puget Sound via valley of Columbia River and branch line from its main line across Cascade Mountains to Puget Sound.

August 4, 1870. Northern Pacific Map of General Route filed.

August 13, 1870. Foregoing map accepted by Secretary of the Interior.

September 20, 1870. Orders issued for withdrawal within twenty miles limits from Northern Pacific general route upon date of receipt by Register and Receiver of orders of withdrawal.

September 28, 1870. Oregon Company's second twenty miles section accepted by President and patents ordered to issue therefor.

October 15, 1870. Northern Pacific withdrawal order of September 20, 1870, received at Oregon Land Office.

October 27, 1870. Order of Secretary of the Interior increasing withdrawal ordered to forty miles on each side of route.

September 29, 1890. The Northern Pacific Forfeiture Act.

[There was never any definite location or construction of the portion of the Northern Pacific Railroad opposite the lands in suit.]

Summary.

In summarizing the results which would seem to follow from this state of facts, it may be said:

First. The Northern Pacific Grant, whether

under Act of 1864 or Joint Resolution of 1870, never attached to any of the lands in suit.

SECOND. The Oregon Grant attached to the lands granted to it upon the filing of the Oregon Company's map of definite location, October 29, 1869, or, certainly, upon the acceptance of that map, January 29, 1870.

THIRD. Unless the Perham Map, notwithstanding its rejection by the Interior Department, effected on the 6th of March, 1865, *ex proprio vigore*, an absolute statutory withdrawal, as of that date, along the whole Northern Pacific line, from Lake Superior to Puget Sound (a wholly preposterous claim), there was never any withdrawal, statutory or otherwise, affecting the lands in suit until upon or after the filing of the Map of August, 1870, except the withdrawal of February, 1870, in favor of the Oregon Company.

FOURTH. If the rights accruing upon the filing of the Map of August, 1870, so far as the line west of the mouth of the Walla Walla River was concerned, depended upon the Joint Resolution of 1870 which authorized the construction of the main line via the Columbia River to Puget Sound, then in respect to that line the Oregon Grant was the prior grant, and the case is pre-

cisely within the case of the Northern Pacific Railroad Company vs. The Musser-Sauntry Company (168 U. S., 604); that is to say, the lands were distinctly *excepted* from the operation of the grant to the Northern Pacific.

In short, the Northern Pacific Grant never attached to these lands for want of a map of definite location or construction of the line, and before they were withdrawn for any purpose the granted lands vested in the Oregon Company upon the filing of its map of definite location October 29, 1869, or certainly upon its acceptance January 29, 1870, and all the lands were withdrawn for the benefit of the Oregon Company by the withdrawal of February, 1870.

It would seem that no claim of interference with the Oregon grant by or through the Northern Pacific grant could be asserted except upon the following grounds:

First. That the passage of the Act of July 2, 1864, operated *eo instanti* to withdraw from the operation of all subsequent grants all lands between the international boundary on the north and a line forty miles as to Territories, and twenty miles as to States, south of the 45th parallel.

SECOND. That the Perham Map, notwithstanding its rejection, effected *ex proprio vigore* an immediate withdrawal, as of March 6, 1865, of all lands within the forty and twenty mile limits from the lines shown thereon, from Lake Superior to Puget Sound.

THIRD. That notwithstanding the attaching of the Oregon grant and the vesting of title in the Oregon Company on the filing of the map of definite location October 29, 1869, and certainly on its acceptance January 29, 1870, the filing of the general route map of August, 1870, either alone or taken in connection with the withdrawal orders subsequently issued thereon, divested the Oregon Company's title to these lands.

We submit that none of these propositions can be seriously considered in the present state of adjudications in respect to the effect and operation of land-grant acts.

Of course, if such rights as may have accrued to the Northern Pacific Company upon filing the general route map of 1870, or the issue of withdrawal orders thereon, were dependent, so far as concerned the line on opposite the mouth of

Walla Walla River via the Columbia River to Puget Sound, upon the Joint Resolution of 1870, which authorized the construction of the main line of the Northern Pacific by that route, then in respect of that portion of the line the Oregon grant was the prior grant, which would of itself defeat every claim of interference asserted by the United States in this case.

The Decision on Final Hearing in the Circuit Court.

The cause having been submitted on the pleadings and proofs, the Circuit Court, Gilbert, J., entered a decree in favor of the complainant for the lands described in the bill, but the learned Judge now distinctly changes his ground. He holds that upon the proofs the map filed by the Northern Pacific Company on the 13th of August, 1870, and which, upon the decision of the demurrer, had been assumed to be a map of definite location, was not such, but was a map of general route. He says this fact is established by the proof and not disputed by the complainant.

He concedes that "there never was a definite "location of the branch line of the Northern "Pacific Railroad," and that "the description of

" the branch line as contained in the act does " not, it is true, fix its point of beginning or " ending, nor definitely determine the location of " any portion thereof," and then proceeds as follows (Record, p. 65):

> " It is not necessary that the title should " have passed to the Northern Pacific Railroad " Company in order that the lands should be " placed in such attitude to the public domain " as to be excluded from a subsequent grant " in aid of another railroad. It is enough if " they were in any way segregated from the " public lands so that at the date of the junior " grant it will be presumed to have been the " intention of Congress to exclude them from " its operation.
>
> " *I hold that it was such segregation to* " *set apart a larger area within which the* " *lands granted to the Northern Pacific* " *Company were to be selected by it. It* " *was sufficient if the lands in controversy* " *in this suit were subject to the contingency* " *of being within the place limits of the* " *branch line whenever that line should re-* " *ceive its definite location.*"

The Court's view of this matter seems to have been that all the lands within the vast area, within which, upon any possible location of its line, the Northern Pacific granted lands might

have been found, ceased to be public lands *eo instanti* upon the passage of the Act of 1864, so that they were from that time forth absolutely and finally excepted out of the operation of any subsequent grant by the United States. [The effect of this doctrine in respect of a railroad line extending from Lake Superior to Puget Sound, with no limitations except that the line should be "within the territory of the United States on a line north of the forty-fifth degree of latitude," is at least startling.]

The Court then refers to the filing of the Perham Map, March 6, 1865, and the application for a withdrawal of lands within the prescribed area upon both sides of the line shown thereon, and, after overruling certain objections made thereto by the Commissioner of the General Land Office, says (Record, p. 68):

> "If a withdrawal of the granted lands
> "within the place limits upon both sides of
> "the general route so selected *had been*
> "ordered by the Commissioner of the Gen-
> "eral Land Office, there can be no doubt
> "that the effect of such action would have
> "been to segregate the withdrawn lands
> "from the public lands subject to disposal
> "by subsequent grant, and would have oper-
> "ated to reserve them therefrom."

And in respect to the Perham Map the Court concludes that

> " This map * * * *furnishes evidence* " of the location of the general route of the " line of the Northern Pacific branch line " and of the consequent segregation of those " lands from the public lands by operation of " law " (Record, p. 68).

Turning then to the General Route Map of August, 1870, the Court says in respect to that map (Record, p. 69) :

> " But, it is conceded that the map of " 1865 was ineffective to accomplish the " withdrawal of lands, and that its rejection " by the Commissioner of the Land Office " is a conclusive adjudication of its in- " sufficiency; the map of 1870 was open to " no such objection. Upon its receipt in the " Land Office the withdrawal of lands was " made upon the records.
>
> " No reason is seen why the map of general " route which is required by the act, even if " filed after the date of the junior grant, does " not, so far as the junior grant is concerned, " serve to sufficiently identify the lands cov- " ered by the prior grant. It is true that " after filing the map of general route of 1870 " the Northern Pacific Company still pos- " sessed the right to change the line whenso- " ever it should make its definite location " thereof, and that it was required by the

" act to file such map of definite location for
" the purpose of finally indicating the lands
" that were to be patented to it. But until
" such final map was filed, the map of general
" route, whereby the withdrawal was in fact
" accomplished, served to sufficiently identify
" the granted lands, notwithstanding the re-
" served right to alter its location. In the ab-
" sence of such map of final location, and un-
" til the same is filed, it is a reasonable pre-
" sumption that the granted lands are those
" which have been withdrawn in pursuance
" of the filings of the map of general route, as
" required under the terms of the grant."

The learned Judge cites no authority for this novel and startling theory, nor does he advert to the fact that before this map of 1870 had been filed the Oregon Grant had taken effect by definite location and construction, and the Oregon withdrawal of February, 1870, had been made.

THE DECISION IN THE CIRCUIT COURT OF APPEALS.

Upon appeal to the Circuit Court of Appeals the judgment in favor of the Government was reversed and a decree entered remanding the cause, with directions to dismiss the Bill. The cause was heard in the Circuit Court of Appeals before Judges MCKENNA and Ross, Circuit Judges; and

HAWLEY, District Judge. The opinion of the Court was delivered by Ross, Circuit Judge, and HAWLEY, District Judge, concurred therein. MCKENNA, Circuit Judge, dissented.

The majority of the Court referring to the filing by the Oregon Company in October, 1869, of its map of definite location, at which time its grant attached by reason thereof, holds that the Joint Resolution of 1870, as held by this Court in the case of United States v. The Northern Pacific Railroad Co., 152 U.S., contained a new grant to the Northern Pacific Railroad Company, but did not embrace any public land disposed of after the passage of the Act of July 2, 1864; and that the Joint Resolution of May 31, 1870, and the proceedings taken thereunder by the Northern Pacific Railroad Company have, therefore, no bearing whatever on the question in this case, and that the effect given by the Court below to the maps filed by the Northern Pacific Railroad Company given under and pursuant to the provisions of the Joint Resolution constitutes one of the errors into which the Court below fell in its decision of the case. The Court then holds that the Perham Map filed in 1865 indicated a route not authorized by the Act of 1864; that it was utterly indefinite and was properly rejected; and

could not effect a statutory withdrawal of the lands in question for the benefit of the Northern Pacific Company; that the act itself did not operate, with or without the Perham map, to withdraw or segregate the lands in controversy from the public domain; that it was not enough that the Northern Pacific might, if it chose to do so at some time or other, select a line opposite to them or within twenty or forty miles of them for its railroad; that, until some designation of route, no specific lands were withdrawn by force of the Act of 1864 from the public domain.

The Court says (Record, p. 174):

> " It is said that the grant contained in the " act in and of itself was 'an appropriation " 'of the public lands.' Of what public " lands? Of all the public lands situated " within that immense belt, through and " along which the Northern Pacific Railroad " Company was authorized to locate and " build its road? Manifestly, if, prior to " any designation by the grantee company " of the line of road it was authorized to " locate and build, the act making the grant " in and of itself operated as an appropria- " tion of any particular land, it operated as " an appropriation of all public lands within " the United States situated north of " the forty-fifth degree of latitude and be-

" tween the termini named in the act; for, " prior to some designation of the route, it " could not be known where the grantee " company would find the most eligible rail- " road route, along which route it was author- " ized to build. We repeat, therefore, that " prior to the designation of some route no " distinction can be made between any of the " public lands not mineral situated in the " belt through and along which the North- " ern Pacific Railroad Company might have " located and constructed its road. Is it " possible that all of that immense body of " public land was by the Act of July 2, 1864, " in and of itself, without any designation by " the grantee company of the line of its road, " withdrawn from subsequent grants? Un- " doubtedly not."

And again (Record, p. 175):

" Until there is some designation of route " by the grantee there is nothing to segre- " gate any particular land from the mass of " public lands, and manifestly, if such segre- " gation never occurs, those that otherwise " might be covered by the grant remain " public lands and subject to any other valid " grant that Congress may have made em- " bracing them. The grant of July 2, 1864, " to the Northern Pacific Railroad Company, " never having taken effect so far as con- " cerns the lands in controversy in this suit, " they were public lands at the time of the

" grant to the Oregon and California Rail-
" road Company, and at the time of the defi-
" nite location by that Company of the road
" it was authorized to build along and oppo-
" site to them."

McKenna, Circuit Judge, in his dissenting opinion, after insisting that the grant to the Oregon Company, being subsequent in date, was not within the express exception contained in the grant to the Northern Pacific Company by the Act of 1864, contends that the latter grant amounted by its very terms to such an appropriation of the lands in controversy as to preclude them from the operation of the grant to the Oregon Company by the Act of 1866. He fully agrees with the majority of the Court in throwing out the Perham map and the maps filed under the resolution of 1870 as having no bearing on the question to be determined. He denies that the necessary consequence pointed out by the majority of the Court—that the mere right of selection under the act within the great area from Lake Superior to Puget Sound and from the 45th parallel to the Canadian line—if it operated to withdraw the lands in controversy from the public domain, would necessarily operate to withdraw the entire

lands within the area in the same way, but he says (Record, p. 179):

> " I cannot see (and I say it with deference)
> " that the consequence, though it inevitably
> " follows that if the lands in controversy be
> " deemed appropriated by the Northern Pa-
> " cific Railroad act all lands situated north
> " of the 45th degree of latitude must have
> " been withdrawn, is very embarrassing. To
> " what is it embarrassing? To settlers? To
> " the occupation and development of the
> " country under the land laws? Not at all.
> " This is prevented by the reservations in the
> " grant. To other railroad companies?
> " Grants to these was not a constant but an
> " occasional policy, and dependent so much
> " upon special circumstances as to require
> " (certainly not necessarily to exclude) a
> " right of selection of route in a wide terri-
> " tory. If this was to be primarily guarded
> " against or to be afterwards corrected, the
> " remedy was in Congress, and obvious."

The learned Judge is not willing to admit that it inevitably follows that all the lands north of the 45th degree of latitude are withdrawn. He thinks that the act limited the area withdrawn to something less than all the land north of the 45th degree of latitude, because, as stated by this Court in United States vs. Northern Pacific Railroad Co., 152 U. S., the authority

given to the Company to adopt the most eligible route did not authorize it, by a map of general route, to cover the unlimited extent of country north of the forty-fifth degree of latitude; on the contrary, when the termini of the railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant. He holds that the power of selection given to the Company by the Act of 1864 of a particular line from a wider extent of territory is a substantial and necessary right which cannot exist in fullness, and with power to exercise it in two railroad companies at the same time. Overlooking the fact that in the case of *United States* v. *The Southern Pacific Railroad Co.*, 146 U. S., 570, the Atlantic and Pacific Railroad had secured its title to the lands there in controversy by the adoption of a map of definite location, he treats that case as substantially disposing of the one now before the Court, and applies all of its language to the issues here involved.

It is decisive, with the learned dissenting Judge, in favor of the United States, that at the date of the grant to the Oregon Company in 1866 the right of locating its road, so as to take the lands in controversy, existed unimpaired in the Northern Pacific Company under the prior grant of 1864, and continued to exist, and did exist, unimpaired in that Company on January 29, 1870, when the Oregon and California Company filed its map of definite location, and when the company built its road, and the patents sought to be vacated were issued to it, and he concludes that as the right to select the lands in controversy by a definite location of its road, if it had seen fit to make one opposite these lands, still existed by virtue of the Act of 1864, when the defendant's grant was made to it in 1866, the lands in suit were not public lands at that time and were expressly excepted from the terms of the grant to the defendant company.

From the decree of the Circuit Court of Appeals remanding the case with directions to dismiss the bill the United States has appealed to this Court.

FIRST POINT.

The Northern Pacific Railroad Company never acquired any title to or claim or interest in any of the lands in controversy in this suit, or any title to or claim or interest in any specific lands opposite its authorized railroad between the mouth of Walla Walla River and Portland, or a point at or near Portland, because the line of said railroad was never definitely fixed opposite such lands.

The Act of 1864 did not convey to the Northern Pacific Company title to or a claim or interest in all the lands lying between Lake Superior and Puget Sound east and west and a line twenty or forty miles south of the 45th parallel and the Canadian boundary line north and south. What it did convey was the right to construct within that area the road described in that act upon some line to be located by itself in conformity with the provisions of the act, and lands on each side of the road when definitely located, and a title *in præsenti* by relation back from the date of definite location to the date of the grant. To only such lands was any title, right or interest

conveyed. When, by a subsequent grant, made in 1866, the Oregon Company acquired a similar right to build a road and have a like land grant from Portland south to the California line, it took a similar title, claim and interest to lands opposite its road when definitely located, but as of the date of its grant by similar relation. This right, title and interest was, of course, subject to be displaced by the prior grant to the Northern Company so far as the prior grant should, if it ever did, attach to any of the same lands; but it never did, and the title acquired by the Oregon Company is, therefore, absolute and free from any incumbrance growing out of the Northern Pacific grant.

(A) Our position thus stated is inherent in the very nature of land grants as uniformly and consistently expounded by the decisions of this Court from the beginning, without any dissent or qualification. It recognizes and gives full effect to the doctrine of relation, whereby, when the definite location has once been fixed, a present title as of the date of the grant inures to the Railroad Company in the prescribed quantity of lands, measured from the definite location, and it maintains with equal consistency the full and complete title of the

Government to all the lands through which the act permits the road to be located other than those so measured for the prescribed distance from the location as definitely fixed.

Nothing short of an actual, final and definite location, binding upon the Company, not to be departed from except with the consent of Congress, can attach the grant to any specific lands, and then only to the lands measured off from the line as definitely located. Anything short of this clear and methodical precision in the construction of land grants, any departure from this uniform theory established by this Court, would throw the whole system of land grants into inextricable confusion; at any rate, no such departure has ever yet been made or hinted at. From the first utterance of the Attorney-General under the earliest land grant acts to the latest decision of this Court one unerring purpose runs in the exact line of the proposition upon which we stand. No designation of general route or other changeable indication of the line of the road gives any title or interest in any specific lands to the Company to which the option is given to acquire by means of final and definite location a complete title, as of the date of the grant, to lands opposite thereto.

Attorney-General Cushing, in an opinion rendered December 19, 1856, said:

> "In my opinion, therefore, the act, by its "text, makes a conditional grant *in præsenti*, "in the nature of a *float*, and which does not "attach to any particular parcel of the pub- "lic lands until the necessary determinative "lines shall have been fixed on the face of "the earth."
>
> Vol. 8, Opinions Attorney-Generals, 246.

Again, at page 395 of the same volume, the Attorney-General said:

> "For all these reasons, my conclusion is, "that, by surveying and marking the lines "on the ground, those lines are definitely "fixed in so far as regards the present sub- "ject matter, that is, to give to the State an "equitable or inchoate title to the depend- "ent lands, * * * that the State per- "fects its inchoate title by filing the plats "in the land office."

In the case of *Menotti* vs. *Dillon*, decided in May 1897 (167 U. S., 703), construing the Central Pacific land grant, which is substantially identical in terms in this respect with the Northern Pacific, Mr. Justice Harlan said, at page 720:

> "The filing of the map of general route "gave the railroad company no claim to any

" specific lands within the exterior limits of
" such route on either side of the road, the
" rule being that a grant of public lands, in
" aid of the construction of a railroad, is,
" until its route is established, in the nature of
" 'a float,' and title does not attach to specific
" sections until they are identified by an ac-
" cepted map of definite location of the line
" of road to be constructed. * * *

" It is true, as said in many cases, that
" the object of an executive order with-
" drawing from pre-emption, private entry
" and sale, lands within the general route
" of a railroad is to preserve the lands,
" unencumbered, until the completion and
" acceptance of the road. But where the
" grant was, as here, of odd-numbered sec-
" tions, within certain exterior lines, '*not*
" ' sold, reserved or otherwise disposed of by
" ' the United States, and to which a pre-
" ' emption or homestead claim may not have
" ' attached at the time the line of said road is
" ' definitely fixed,' the filing of a map of gen-
" eral route and the issuing of a withdrawal
" order did not prevent the United States, by
" legislation, at any time prior to the definite
" location of the road, from selling, reserving
" or otherwise disposing of any of the lands
" which, but for such legislation, would have
" become, in virtue of such definite location,
" the property of the railroad company."

And in *Northern Pacific Railroad Co.* v. *San-*

ders,1 66 U. S., 620, decided by the Court in April 1897, the Court said (p. 634):

> " The company acquired, by fixing its gen-
> " eral route, only an inchoate right to the odd-
> " numbered sections granted by Congress, and
> " no right attached to any specific section
> " until the road was definitely located and
> " the map thereof filed and accepted."

There is obviously the same need of certainty as to the subject of conveyance in a grant by Act of Congress as in a grant by an individual, and this certainty is secured in a land grant by Act of Congress by means of the artificial doctrine of relation from the ascertainment of the subject by definite location back to the date of the grant, and can only be predicated of it in that way. It might be competent for Congress to fix some other method of ascertaining the location, but it never has done so and did not do so in this particular instance. An ascertainment by the means declared by Congress and adjudged by this Court is vital and essential to any title, right or interest in the Company in any specific lands. It is only by definitely fixing the line as the line on which the road is to be built that the necessary criterion is established for determining the granted lands.

Approximate maps, maps of general route, are changeable and ascertain nothing. They do not affect the title in any way; that still remains in the Government. It is never certain that the definite location will correspond with the general route or with the withdrawals under it in whole or in part. It may be so far remote that the widest stretch of the land grant will never touch it or come within the measuring distance of it prescribed by the act. The proposition we are contending for is so important and controlling in the present controversy, and is so firmly imbedded in the decisions of this Court, that we venture, at the risk of wearying its patience, to recall its uniform utterances on the subject:

The opinions of Mr. Cushing were before the Supreme Court in the cases arising upon the Iowa grant, in 9 Wallace, *R. R. Co.* v. *Fremont County* (p. 89) and *R. R. Co.* v. *Smith* (p. 95).

In the first case Mr. Justice Nelson said (p. 94):

> "Until the line of the railroad was "definitely fixed upon the ground, there "could be no certainty as to the particular "sections of lands falling within the grant; "nor could the title to any particular sec- "tion on the line of the road vest in the "company. The grant was in the nature

" of a float until this line was permanently
" fixed. Now, the proofs show that the loca-
" tion of the road was not made on the
" ground and adopted by the company till,"
&c.

The same grant was involved in *Railroad Land Co.* v. *Courtright* (21 Wall., 310, 316), and the Court said:

" When the line of the road was fixed, and
" the location of the odd sections thus became
" certain, the title of the State acquired pre-
" cision, and at once attached to the land."

Schulenberg v. *Harriman*, 21 Wall., 44, 60:

" The title passed to the sections, to be
" afterwards located; when the route was
" fixed their location became certain, and the
" title, which was previously imperfect, ac-
" quired precision and became attached to the
" land."

Leavenworth, &c., R. R. Co. v. *U. S.*, 92 U. S., 733, 741:

" They vest a present title in the State of
" Kansas, though a survey of the lands and a
" location of the road are necessary to give
" precision to it, and attach it to any partic-
" ular tract."

Mo., &c., Ry. Co. v. *Kan. Pac. Ry. Co.*, 97 U. S., 491.

Grinnell v. *Railroad Co.*, 103 U. S., 739, 742.

In the last case above cited Mr. Justice Miller said:

> " The grant under the act of 1856 was, as
> " has been often said, a grant *in præsenti*,
> " and though exactly what this means has
> " been the subject of much controversy, we
> " think its ascertainment is not difficult.
> " The only doubtful element of the problem
> " is the location of the road, which, by the
> " terms of these grants, is necessary to iden-
> " tify the sections granted on each side of it.
> " Whenever that is done so that a surveyor
> " or the officers of the Land Department can
> " protract the line of the route on the maps
> " of the public lands within the limit of the
> " grants, the identity of the lands granted is
> " mathematically ascertained, and the title
> " relates back to the date of the grant. * * *
> " The means of ascertaining precisely what
> " lands have passed by the grant is to be
> " found in the map of the line of the road,
> " which is filed in the General Land Office
> " under provisions of the statute."

Van Wyck v. *Knevals*, 106 U. S., 360. Mr. Justice Field said (p. 364):

> " The principal question for determination
> " in this case is, When does the grant made to
> " Kansas by the act of Congress of July 23,
> " 1866, * * * take effect so as to cut off
> " the right of pre-emption from subsequent
> " settlers on the land? * * * The

" grant is one *in præsenti*, except as its " operation is affected by that condition; that " is, it imports the transfer, subject to the " limitations mentioned, of a present interest " in the lands designated. The difficulty " in immediately giving full operation to it " arises from the fact that the sections desig- " nated as granted are incapable of identifi- " cation until the route of the road is 'defin- " 'itely fixed.' When that route is thus " established, the grant takes effect upon the " sections by relation as of the date of the " Act of Congress. In that sense we say " that the grant is one *in præsenti*. It cuts " off all claims, other than those mentioned, to " any portion of the lands from the date of " the act, and passes the title as fully as " though the sections had then been capable " of identification. * * * When the route " of the road is 'definitely fixed,' no parties " can subsequently acquire a pre-emption " right to any portion of the lands covered " by the grant. The right of the State and " of the company is thenceforth perfect as " against subsequent claimants under the " United States.

" The inquiry then arises, when is the " route of the road to be considered as " 'definitely fixed' so that the grant at- " taches to the adjoining sections? The " complainant in the Court below, who de- " rives his title from the company, contends " that the route is definitely fixed, within the

" meaning of the Act of Congress, when the " company files with the Secretary of the In- " terior a map of its lines, approved by its " directors, designating the route of the pro- " posed road. On the other hand, the de- " fendant—the appellant here—who acquired " his interest by a subsequent entry of the " lands and a patent therefor, contends that " the route cannot be deemed definitely fixed, " so that the grant attaches to any particular " sections and cuts off the right of entry " thereof until the lands are withdrawn from " market by order of the Secretary of the " Interior, and notice of the order of with- " drawal is communicated to the local land " officers in the district in which the lands " are situated.

" We are of opinion that the position of " the complainant is the correct one. The " route must be considered as 'definitely " fixed' when it has ceased to be the subject " of change at the volition of the company. " Until the map is filed with the Secretary of " the Interior, the company is at liberty to " adopt such a route as it may deem best, " after an examination of the ground has " disclosed the feasibility and advantages " of different lines. But when a route is " adopted by the company and a map desig- " nating it is filed with the Secretary of the " Interior and accepted by that officer, the " route is established; it is, in the language " of the act, 'definitely fixed,' and cannot be

" the subject of future change, so as affect
" the grant, except upon legislative consent.
" No further action is required of the com-
" pany to establish the route."

Kansas Pacific Ry. Co. v. *Dunmeyer*, 113 U. S., 629. Mr. Justice MILLER said (p. 634):

" This entry of Miller's, therefore, brought
" the land within the language of the ex-
" ception in the grant as land to which a
" homestead claim had attached at the time
" the line of said road was definitely fixed.
" For we are of opinion, that under this
" grant, as under many other grants contain-
" ing the same words, or words to the same
" purport, the act which fixes the time of
" definite location is the act of filing the map
" or plat of this line in the office of the Com-
" missioner of the General Land Office.

" The necessity of having certainty in the
" act fixing this time is obvious. Up to that
" time the right of the company to no
" definite section, or part of section, is fixed.
" Until then many rights to the land along
" which the road finally runs may attach,
" which will be paramount to that of the
" company building the road. After this no
" such rights can attach, because the right of
" the company becomes by that act vested.
" It is important, therefore, that this act fix-
" ing these rights shall be one which is open
" to inspection. At the same time it is an
" act to be done by the company. The com-

" pany makes its own preliminary and final
" surveys by its own officers. It selects for
" itself the precise line on which the road is
" to be built, and it is by law bound to re-
" port its action by filing its map with the
" Commissioner, or rather, in his office. The
" line is then fixed. The company cannot
" alter it so as to affect the rights of any other
" party. Of course, as soon as possible, the
" Commissioner ought to send copies of this
" map to the registers and receivers through
" whose territory the line runs. But he may
" delay this, or neglect it for a long time,
" and parties may assert claims to some of
" these lands, originating after the company
" has done its duty—all it can do—by
" placing in an appropriate place, and among
" the public records, where the statute says
" it must place it, this map of definite loca-
" tion, by which the time of the vestiture of
" their rights is to be determined. We con-
" cede, then, that the filing of the map in
" the office of the Commissioner is the act by
" which 'the line of the road is definitely
" fixed' under the statute (Van Wyck vs.
" Knevals, 106 U. S., 360). * * *

" When the line was fixed, which we have
" already said was by the act of filing this
" map of definite location in the General
" Land Office, then the criterion was estab-
" lished by which the lands to which the
" road had a right were to be determined.
" Topographically this determined which

" were the ten odd sections on each side of
" that line where the surveys had then been
" made. Where they had not been made,
" this determination was only postponed un-
" til the survey should have been made.
" This filing of the map of definite location
" furnished also the means of determining
" what lands had previously to that moment
" been sold, reserved, or otherwise disposed
" of by the United States, and to which a
" pre-emption or homestead claim had at-
" tached ; for, by examining the plats of this
" land in the office of the register and re-
" ceiver, or in the General Land Office, it could
" readily have been seen if any of the odd sec-
" tions within ten miles of the line had been
" sold, or disposed of, or reserved, or a home-
" stead or pre-emption claim had attached to
" any of them. In regard to all such sections
" they were not granted. The express and
" unequivocal language of the statute is that
" the odd sections *not* in this condition are
" granted (p. 640)."

Buttz v. *N. P. R. R. Co.*, 119 U. S., 55. Mr. Justice FIELD said (p. 71):

" The act of Congress not only contem-
" plates the filing by the company, in the
" office of the Commissioner of the General
" Land Office, of a map showing the definite
" location of the line of its road, and limits
" the grant to such alternate odd sections as
" have not, at that time, been reserved, sold,

" granted, or otherwise appropriated, and are
" free from pre-emption, grant or other
" claims or rights; but it also contemplates a
" preliminary designation of the general
" route of the road, and the exclusion from
" sale, entry or pre-emption of the adjoining
" odd sections within forty miles on each
" side, until the definite location is made.
" The sixth section declares that after the
" general route shall be fixed, the President
" shall cause the lands to be surveyed for
" forty miles in width on both sides of the
" entire line as fast as may be required for
" the construction of the road, and that the
" odd sections granted shall not be liable to
" sale, entry or pre-emption before or after
" they are surveyed, except by the company.
" The general route may be considered as
" fixed when its general course and direction
" are determined after an actual examination
" of the country or from a knowledge of it,
" and is designated by a line on a map show-
" ing the general features of the adjacent
" country and the places through or by
" which it will pass. The officers of the
" Land Department are expected to exercise
" supervision over the matter so as to require
" good faith on the part of the company in
" designating the general route, and not to
" accept an arbitrary and capricious selec-
" tion of the line irrespective of the character
" of the country through which the road is
" to be constructed. When the general

" route of the road is thus fixed in good
" faith, and information thereof given to the
" Land Department by filing the map thereof
" with the Commissioner of the General
" Land Office, or the Secretary of the Inter-
" ior, the law withdraws from sale or pre-
" emption the odd sections to the extent of
" forty miles on each side. The object of
" the law in this particular is plain: it is to
" preserve the land for the company to which,
" in aid of the construction of the road, it is
" granted." * * *

" Nor is there anything inconsistent with
" this view of the sixth section as to the
" general route, in the clause in the third
" section making the grant operative only
" upon such odd sections as had not
" been reserved, sold, granted, or otherwise
" appropriated, and to which pre-emption and
" other rights and claims have not attached,
" when a map of the definite location has
" been filed. The third section does not em-
" brace sales and pre-emptions in cases where
" the sixth section declares that the land shall
" not be subject to sale or pre-emption. The
" two sections must be so construed as to
" give effect to both, if that be practicable."

Sioux City Land Co. v. *Griffey*, 143 U. S., 32, 38:

" The first and principal question is at
" what time the title of the railroad company
" attached, whether at the time the map of
" definite location was filed in the General

"Land Office at Washington, or when, prior "thereto, its line was surveyed and staked "out on the surface of the ground. While "the question in this precise form has never "been before this Court, yet the question as "to the time at which the title attaches, under "grants similar to this, has been often pre- "sented, and the uniform ruling has been "that it attaches at the time of the filing of "the map of definite location."

Then, after citations from the decisions in *Van Wyck* v. *Knevals* and *Pacific Railway Co.* v. *Dunmeyer*, the Court said (p. 39):

"The reasoning of these opinions is ap- "plicable here. The fact that the company "has surveyed and staked a line upon the "ground does not conclude it. It may sur- "vey and stake many, and finally determine "the line upon which it will build by a com- "parison of the cost and advantages of each; "and only when by filing its map it has com- "municated to the Government knowledge "of its selected line, is it concluded by its "action. Then, so far as the purposes of the "land grant are concerned, is its line defi- "nitely fixed; and it cannot thereafter, with- "out the consent of the Government, change "that line so as to affect titles accruing there- "under."

The Courts were met in the very early his-

tory of the judicial construction of these grants with the difficulty that under the common law there was a necessity of identification of the thing granted by the conveyance, or it would be void for uncertainty. To avoid this and effectuate (properly) the intent of Congress, following the principle in *Rutherford vs. Green's Heirs* (2 Wheat., 196) and *Fremont vs. United States* (17 How., 676), it was held as a proper construction of an act of this character that it vested a present interest, was a grant *in præsenti*, but uncertain as to location until identified by the act of the Company, viz., by selecting and designating on a map the final location of its line.

It has never been held that the term "grant *in præsenti*" in a railroad land grant meant more than a right to have or take as of the date of the grant the land identified on the filing of a map of definite location. The so-called "present interest" which passed by the grant was this right, and nothing more; and it was given as fully as Congress could give it.

Justice MILLER, in *Grinnell* v. *C. R. I. & P. R. R. Co.* (103 U. S., p. 739), states the position clearly, at page 744:

"The grant under the Act of 1856 was, as

"has been often said, a grant *in præsenti*,
"and though exactly what this means has
"been the subject of much controversy, we
"think its ascertainment is not difficult.
"The only doubtful element of the problem
"is the location of the road, which, by the
"terms of these grants, is necessary to
"identify the sections granted on each side
"of it. Whenever that is done, so that a
"surveyor or the officers of the Land Depart-
"ment can protract the line of the route on
"the maps of the public lands within the
"limit of the grants, the identity of the
"lands granted is mathematically ascertained,
"and the title relates back to the date of the
"grant.

"So far as lands are found in place, when
"this is done, not coming within the excep-
"tions as sold, or held under pre-emption,
"the title, or at least the right to this land in
"place, is at once vested in the State or in the
"company to which the State has granted it,
"and the means of ascertaining precisely
"what lands have passed by the grant is
"to be found in the map of the line of the
"road, which is filed in the General Land
"Office under provisions of the statute."

In the long line of railroad land grant cases from *R. R. Co.* v. *Fremont* (9 Wall., 89) to *Curtner* v. *U. S.* (149 U. S., 675), the doctrine stated by Mr. Justice MILLER has not only never

been modified or deviated from, but it has never been more plainly and comprehensively put.

No one can misunderstand it nor hesitate as to its proper application when a case is presented.

R. R. Co. v. *Fremont Co.* (9 Wall., 89).

> " Until the line of the railroad was defin-
> " itely fixed upon the ground, there could be
> " no certainty as to the particular sections of
> " lands falling within the grant; nor could
> " the title to any particular section on the
> " line of the road vest in the company. The
> " grant was in the nature of a float until
> " this line was permanently fixed."

R. R. Co. v. *Smith* (9 Wall., 95, 97).

> " This, of course, left it to be determined
> " by the location of the road what precise
> " lands were granted."

R. R. Co. v. *Courtright* (21 Wall., 310, 316).

> " It [the Act of May 15, 1856] passed a
> " title * * * to be afterwards located.
> " When the line of the road was fixed * * *
> " the title of the State acquired precision,
> " and at once attached to the land."

Schulenburg v. *Harriman* (21 Wall., 44, 60).

> " The title, which was previously imper-
> " fect, acquired precision and became attached
> " to the land."

L. L. & G. R. R. v. *The U. S.* (92 U. S., 733).

" 'There be and is hereby granted' are " words of absolute donation. * * * They " vest a present title in the State of Kansas, " though a survey of the lands and a loca- " tion of the road are necessary to give pre- " cision to it, and attach it to any particular " tract. The grant then becomes certain, " and by relation has the same effect upon " the selected parcels as if it had specifically " described them. In other words, the grant " was a float until the line of the road should " be definitely fixed " (p. 741).

M., K. & T. Ry. Co. v. *K. P. Ry. Co.* (97 U. S., 491).

" When that [establishment of route] was " settled, the location became certain, and " the title that was previously imperfect " acquired precision and attached to the " lands " (p. 497).

Ryan v. *The R. R. Co.* (99 U. S., 382).

" The grant was *in præsenti*, and acquired " precision upon the definite location of the " road " (p. 389).

Platt v. *U. P. R. R. Co.* (99 U. S., 48).

" By force of the grant, however, and by " the definite fixing of the route of the road, " and the filing of the map thereof * * *

" together with the completion of the road " * * * the title to that tract had become " vested in the company " (p. 56).

Ry. Co. v. *Alling* (99 U. S., 463).

" When such location and appropriation " were made, the title, which was previously " imperfect, acquired precision, and by rela- " tion took effect as of the date of the grant" (p. 475).

Van Wyck v. *Knevals* (106 U. S., 360).

"The grant is one *in præsenti*, * * * " that is, it imports the transfer * * * of " a present interest in the lands designated. " The difficulty in immediately giving full " operation to it arises from the fact that the " sections designated as granted are incapable " of identification until the route of the " road is definitely fixed. When that route " is thus established, the grant takes effect " upon the sections by relation as of the date " of the act of Congress."

" In that sense we say that the grant is one " *in præsenti*. It cuts off all claims, other " than those mentioned, to any portion of " the lands from the date of the act, and " passes the title as fully as though the sec- " tions had then been capable of identifica- " tion" (p. 365).

See also, *St. P. R. R.* v. *Winona R. R.* (112 U. S., 720).

On definite location, the title then perfected, related back to the date of the statute. No vested right can attach to lands in place until identified, and this cannot be until map of definite location (*Ibid.*, pp. 731, 732).

Wisconsin R. R. Co. v. *Price County* (133 U. S., 496).

The title conferred by the act is necessarily an imperfect one, because, until the lands are identified they could not be located; until then, therefore, the grant was a float, but, on definite location, became fixed.

Deseret Salt Co. v. *Tarpey* (142 U. S., 241), is a strongly-worded case as to present interest passing by the grant, but the opinion says of the lands,

> "they could not be located until the line of
> " the road was fixed. The grant was, there-
> " fore, in the nature of a 'float'; but, when
> " the route of the road was definitely fixed,
> " the sections granted became susceptible of
> " identification, and the title then attached as
> " of the date of the grant," &c.

So that in every case of railroad land grants, prior to definite location of line and filing of the map thereof with the proper officers of the Interior

Department, the grant *in præsenti* is only a 'floating' right to some land to be ascertained later, if at all,—complete by the act, so far as concession on the part of the Government is concerned, but, practically, the 'grant' as to any particular tracts of land exists in contemplation only until 'definite location.'

Therefore, wherever in this argument these grants are spoken of as being *in præsenti* it is to be understood as used by Mr. Justice FIELD in *Van Wyck* v. *Knevals*, 106 U. S., 360, 365:

> "When that route is thus established [by "definite location], the grant takes effect "upon the sections by relation as of the date "of the Act of Congress. In that sense we "say that the grant is one '*in præsenti*.'"

And in view of this unbroken and harmonious series of adjudications upon the subject, the cases of the *United States* v. *Southern Pacific R. R. Co.*, as reported in 146 U. S. and 168 U. S., afford convincing proof that the theory upon which we stand for our rights in this case is no longer open to doubt or disputation.

In the former case, *U. S.* v. *Southern Pacific R. R. Co.*, 146 U. S., 570, the relative positions of the two companies to each other and to the Gov-

ernment in respect to the lands in controversy were identical with those of the parties in the present action, with this controlling and there fatal difference, that, whereas in the present case the prior grant to the Northern Pacific Company never took effect as to any particular line by means of a definite location, giving title as of the date of the grant, in that case the Atlantic and Pacific Company, by filing a map of its definite location under its prior grant, acquired title as of the date of the grant to the very lands in controversy; and it was upon this very point that the court held that they were excluded from the effect of the subsequent grant to the Southern Pacific Railroad Company. But no man can read that opinion without reaching the inevitable conclusion that but for the filing of the map of definite location, which gave title to the Atlantic and Pacific to the very lands in controversy as of the date of its prior grant, the title of the Southern Pacific Company would have been recognized as perfect, because without that those lands were not embraced in and would not have passed by the grant to the Atlantic and Pacific. The case is decided on the very ground which we are here now urging, the Court there demonstrating that

the title to the very lands in controversy was by means of the definite location by the Atlantic and Pacific—and by no other means, for no other means was possible—conveyed by the prior grant to the Atlantic and Pacific as of the date of that grant. It says (p. 593):

> "The grants to both the Atlantic and "Pacific and the Southern Pacific Companies "were grants *in præsenti*. The language is "'there be, and hereby is, granted.' The "construction and effect of such words of "grant have often been considered by this "court."

It cites the then recent case of *St. Paul and Pacific R. R. Co. v. Northern Pacific R. R. Co.*, 139 U. S., 1, 5, thus:

> "The language of the statute is 'that "'there be, and hereby is, granted' to the "Company every alternate section of the "lands designated, which implies that the "property itself is passed, not any special "or limited interest in it. The words also "import a transfer of a present title, not a "promise to transfer one in the future.
>
> "The route not being at the time deter-"mined, the grant was in the nature of a float "and the title did not attach to any specific "sections until they were capable of identi-"fication; but when once identified the title

" attached to them as of the date of the grant,
" except as to such sections as were specific-
" ally reserved. It is in this sense that the
" grant is termed one *in præsenti*; that is to
" say, it is of that character as to all lands
" within the terms of the grant, and not
" reserved from it at the time of the definite
" location of the route."

The Court then proceeds (p. 594):

" In view of this late and clear declara-
" tion, it would be a waste of time to attempt
" a re-examination of the questions, or a re-
" statement of the reasons which have
" established these as the settled rules of
" law in respect to land grants, and made it
" so that the old common law rule as to the
" necessity of identification to a conveyance
" has not been controlling in determining
" the scope and effect of a Congressional
" land grant,"

relying again on the Court's statement in *Bardon v. Northern Pacific Railroad*, 145 U. S., 535.

Again, it says, (p. 594):

" Applying these well-settled rules to
" the cases at bar, there can be little difficulty
" in arriving at a conclusion. The grant to
" the Atlantic and Pacific was made in 1866;
" to the Southern Pacific in 1871. They

" were grants *in præsenti*. When maps of
" definite location were filed and approved,
" the grants severally took effect by relation
" as of the dates of the acts. The map of
" definite location of the Atlantic and Pa-
" cific Company's road along the lands in
" controversy was filed and approved on
" April 11, 1872. Then the specific tracts
" were designated, and to them the title of
" the Atlantic and Pacific attached as of
" July 27, 1866. If anything in the land
" laws of the United States can be consid-
" ered as thoroughly settled by repeated de-
" cisions, it is this. It matters not when the
" map of definite location of the Southern
" Pacific was filed and approved, whether
" before or after April 11, 1872; for when
" filed the grant could take effect by relation
" only as of March 3, 1871, and at that time,
" and for nearly five years theretofore, the
" title to these lands had been in the At-
" lantic and Pacific."

It then proceeds to demonstrate from the evidence that the map of the Atlantic and Pacific, the sufficiency of which as a map of definite location had been disputed by counsel, was in fact and in law such a map, and holds that it was such.

" So now, whatever may have been the
" dates of filing by the respective companies,

> " the case stands as though the lands granted
> " to the Atlantic and Pacific had been iden-
> " tified in 1866, and title had then passed,
> " and there never was a title of any kind
> " vested in the Southern Pacific Company "
> (p. 598).

The Court then explains with renewed clearness the distinction between the line of definite location and of general route, citing the case of *Buttz* v. *The Northern Pacific Railroad Company*, 119 U. S., 55, which was a case of this very Northern Pacific Company, and, observing the substantial identity of the two acts, says, at p. 600):

> " It must be held that here, as there, Con-
> " gress provided for two separate matters;
> " one the fixing of the general route, and the
> " other the designation of the line of definite
> " location; and an examination of the evidence
> " shows that the map which was filed on
> " April 3, 1871, was simply one of general
> " route, and therefore did not work a desig-
> " nation of the tracts of land to which the
> " Southern Pacific's grant attached."

And it was because the title of the Atlantic and Pacific had so attached as of the date of its prior grant and by means of the filing of a map of definite location that the Court held, and so

only was it able to hold, that the title which had been so acquired to the lands in controversy, being forfeited for breach of the condition subsequent by its failure to build the road within the time prescribed, reverted to the United States for its benefit, and was necessarily not included in the subsequent grant to the Southern Pacific.

And in the case between the same parties (*Southern Pacific Railroad* v. *The United States*, 168 U. S., page 1) it is obvious that there could have been no possible room for the controversy presented to this Court, or for the serious and elaborate consideration which the Court gave to it, if the definite location of the land, which in that case amounted to 700,000 acres, had not been regarded by the Court under the authorities as absolutely essential to the title of the United States, as resumed by the act of forfeiture from the Atlantic and Pacific Company. It was claimed on the part of the Southern Pacific Company that by the production of new evidence it could show that the map of the Atlantic and Pacific Company, filed in 1872, was not in fact and in law a map of definite location, as it had been assumed and held to be in the prior case, but was only at the best a map of

general route, by means of which no title passed by relation to the Atlantic and Pacific Company. And it was attempted, first, to show that the former adjudication in 146 U. S. was not *res adjudicata*, and secondly, that, going behind the judgment, the evidence disproved the existence and the character of the map as a map of definite location.

The Court held against the Southern Pacific on the former ground, but it is plain that the whole controversy would have been out of place and the contentions of the Company could have been answered in a single sentence, if it had been possible for the Court to say that by the terms of the act, or by a map of general route, or by anything short of a map of definite location, the grant could have attached to the specified lands and title thereby vested in the Atlantic and Pacific as of the date of the grant.

(B) The position for which we here contend is in entire harmony with the doctrine that priority of grant determines the question of ownership, without regard to priority of location, as between parties claiming the same lands under different grants. Nor is it necessary for us to claim any

benefit of the exception or reservation contained in the granting clause of the Act of 1864, donating lands to the Northern Pacific; nor do we in any way come in conflict with the observation of the Court in *M., K. & T. Railway Co.* v. *The K. P. Railway Co.*, 97 U. S., 491, that it was not within the language or the purpose of the reservation in the granting act "to except from its operation any "portion of the designated lands for the purpose "of aiding in the construction of other roads," which doctrine was repeated in the case of *St. Paul and Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S., 1, in these words (p. 17):

> "But independently of this conclusion, we "are of opinion that the exception in the act "making the grant to the Northern Pacific "Railroad Company was not intended to cover "other grants for the construction of roads of "a similar character, for this would be to "embody a provision which would often be "repugnant to and defeat the grant itself."

In other words, we are not called upon to claim that, by virtue of the exception contained in the granting clause of the Northern Pacific Act, the Oregon Company could, by a grant subsequent thereto, but procured prior to the definite location of the Northern Pacific road, acquire title to lands

already first granted to the Northern Pacific. What we do claim exactly is this, as has already been made to appear, that there was no grant to the Northern Pacific by the Act of 1864 of the lands in suit or of any lands opposite its authorized railroad between the mouth of Walla Walla River and Portland; that all that was granted to that company in that behalf was the lands opposite to and within the prescribed distance from the line of railroad, which that company should locate within the bounds of the prescribed area by means of a definite location, if it did in fact make such a location. By such means only it would acquire title from the date of the act; but, no such location having been made opposite the lands in suit while the act remained operative and effectual, they acquired no title to these lands and the grant passed no interest in them to that Company.

The observations cited from the decisions referred to in 97 U. S. and 139 U. S. cannot be removed from their context and from the actual cases in which they were uttered, and distorted and perverted to wholly different uses and applications which could not possibly have been within the consideration of the Court when they were uttered. In both of those cases the

contest was between the titles of two railroad companies, one of which had a prior grant and had definitely located its road over and through the very lands in controversy so as to acquire title as of the date of its grant. The observations referred to have no application, and can have no honest application, to a case where, while the power to make it existed, no definite location was ever made, no title acquired, and none of the lands in controversy ever passed under any prior grant.

(C) Nor does our contention involve us in the position denounced by the Court in the case of the Southern Pacific Railroad Co., in 146 U. S., of a scramble with the Northern Pacific Company for the grasping of title by priority of location, or of seeking to acquire land already once given to a like Company, or of claiming for ourselves the benefit of the forfeiture of title which inured to the benefit of the United States alone, or of seeking to appropriate by means of our grant any tract of land within our specified limits which at any time subsequent to its date might have become public lands. We make no such claims and are under no necessity of making them. All we claim is that by the land grant

law as settled and administered by this Court from the beginning, there was no grant of the lands in controversy to the Northern Pacific Railroad Company by or under the Act of 1864; that it never had title and that the lands continued to be and were public lands, when the right to locate was granted to the Oregon and California Railroad Company. It is true that the Northern Pacific Company, if the act of forfeiture had not been passed by Congress, might yet definitely locate its line within reach of the lands in question and so acquire title to them, and might construct its road as so located; that its title to these lands acquired by definite location might become perfect by construction; and that no power but that of Congress could interfere with this right of the Northern Pacific to definitely locate and construct its road, because no one but the grantor can raise the question of a breach of a condition subsequent.

But the road was not definitely located nor constructed, and Congress did pass the forfeiture act, which terminated the right of the Northern Pacific to acquire title to any lands opposite unconstructed road. That terminated finally its possible right to acquire title to any of these lands.

On the other hand, we took our title by our grant and by our subsequent definite location, and perfected it by the construction of the road within the terms of our act, subject to the possibility of the Northern Pacific definitely locating its road so as to reach the same lands. While it had that power to locate, our subjection to that possibility continued; but when, by the forfeiture act, the right of acquiring any lands opposite unconstructed road was taken away, that subjection ceased; and the lands in question remained indisputably ours.

SECOND POINT.

The passage of the Northern Pacific Act of July 2, 1864, did not operate to withdraw *eo instanti* all the public lands within the vast area from Lake Superior to Puget Sound and from the international boundary to a line forty miles or twenty miles south of the 45th parallel of north latitude.

Nothing in previous adjudications of this Court supports or gives countenance to this proposition apparently relied upon by the counsel for the Government in this case, and which necessarily involves the result that the grant to the Northern Pacific, having given that Company leave to locate its road anywhere within a given area of territory, no subsequent grant, however explicit in terms, could be construed to grant to another Company any lands anywhere within that area, in case the Northern Pacific had never definitely located its line and thus limited itself to specific lands. The Government apparently relies upon this proposition because short of this proposition no ground can be found or stated by which to defeat the claims asserted by the Oregon Company in this action. We can discover no other justification for its reliance upon this theory.

Here was an area embracing many vast States and Territories, extending from Lake Superior to Puget Sound, more than fourteen hundred miles, and from say twenty miles south of the 45th parallel to the Canadian line, about three hundred miles, aggregating more than four hundred thousand square miles. The grant to the Northern Pacific (which has been stated by this Court in previous cases as reaching the almost appalling amount of about eighty thousand square miles) was to be acquired in this multifold greater area by actual definite location, and by no other means. Upon filing a map of general route it was to be entitled to withdrawal within the prescribed limits from that particular route, but withdrawal was limited to the distances measured from that route.

Unless it can be successfully contended that by this grant thus to locate within this vast area the Government had cut off all grants for other internal improvements within that area until the Northern Pacific should see fit to limit itself to specific lands by definite location, the grant to the Oregon Company, which complied with its conditions by a definite location and actual construction according to the terms of the act, gave the Oregon

Company good title, subject only to the condition that, if it should happen that the Northern Pacific definitely located its road so as to reach the same lands, it would acquire title thereto by relation as of the date of its prior grant. The right of the prior grant to take lands within this area was not restricted, but the Government did not disable its subsequent grantees from taking subject to the prior grantees' rights.

The construction of the Act of 1864 contended for by the Government, is, we submit, monstrous and impossible. It imputes to Congress necessarily the purpose of withdrawing from the public domain by the very passage of the act, without anything done by the Railroad Company, all the land within the area through which the right of selection and locating is given, and declaring it to be no longer public land and subject as such to the control and action of Congress, and directing that this vast area shall so remain until the Railroad Company should see fit, if it did, to limit and restrict its grant by definitely locating its line.

Our construction, on the other hand, is reasonable and sensible and in entire harmony with and required by the unbroken series of decisions of this Court set forth under subdivision A of our

First Point. It is that Congress, by the land grant of 1864, while giving to the grantee the choice of ground within the territory prescribed by the act, whereupon to locate its road, said explicitly to the grantee: You may take anywhere you please within this area the odd-numbered sections within twenty (or forty) miles on each side of the road, which you shall definitely locate. We give you no more and no less; all such land shall, upon the definite location of your road, be deemed to have ceased, so far as other grants of this character are concerned, to be public land as of the date of the act, but all the rest of this imperial area shall be and remain public land and subject to the disposal of Congress for any purpose it may see fit. If your location, made according to the terms of the act, shall conflict with any subsequent grant, your grant, being prior in date, will take precedence, but all this vast possible area of grant is not granted to you or withdrawn from the category of public lands of the United States for your benefit.

You may obtain withdrawal by filing a proper map showing specifically a line of general route. You may secure the vesting of title as of

the date of the Granting Act by definitely locating your road; but you cannot keep this whole vast area to yourself or withdrawn for your benefit until you choose to limit and restrict your rights by fixing your line.

There is no authority which we can find for the Government's proposition in this regard. Every adjudicated case upon the subject or approaching the subject seems clearly to prescribe wholly different rules of construction irreconcilable with this proposition of the Government. There is not the slightest reason for claiming that Congress intended by this act to withdraw this whole vast area from availability in securing works of internal improvement. Its whole course of conduct in that regard is inconsistent with any such hypothesis.

The determination of the general route of the road and filing a map thereof in the Department of the Interior has always been treated as a prerequisite to any withdrawal under this Northern Pacific Act and similar acts.

Buttz v. *Northern Pacific Railroad*, 119 U. S., 55.
Dunmeyer Case, 113 U. S., 636.
St. Paul and Pacific v. *Northern Pacific*, 139 U. S., 1.

THIRD POINT.

The claim set up in argument in the Circuit Court and to some degree apparently countenanced by Mr. Justice McKenna in his dissenting opinion, that the act itself definitely located the branch line of the Northern Pacific Railroad along the immediate course of the Columbia River from the mouth of Walla Walla River to Portland, seems to us equally destitute of authority or foundation.

Such a theory has never been suggested in any other case to our knowledge, and is inconsistent with the whole theory of the land grant law as administered by this Court and with the provisions of the Northern Pacific act itself. Certainly it did not follow from the enactment of the grant of 1864 that the company would ever adopt or definitely locate or construct its road from the mouth of Walla Walla River along the immediate line of the Columbia River to Portland. It never did definitely locate or construct any road there at all, and it is an entirely new theory that the land grant act imposes title upon a company whether it pleases to take

it or not. On the contrary, the act certainly calls for affirmative action on the part of the company to acquire either reservation or title. By the sixth section it must as to every inch of line designate its general route before it can be entitled to the reservation by withdrawal, and by the third section it must make a definite location as to every inch of line before it can acquire title to lands opposite thereto.

But, again, if the act itself worked a definite location all the way or any part of the way down the Columbia River from the mouth of the Walla Walla River to Portland, then all the consequences which follow definite location must ensue, not only as to other railroad companies, but as to all other parties whatever from the mere passage of the act; and all possible settlement of the country through that three hundred miles of the fertile banks of a great river must be deemed to have been cut off by the naked fact of the passage of the act, for, certainly, that definite location once accomplished by whatever means, there could be no homestead rights, no preemption rights, no settlers' rights of any kind secured by citizens—consequences which this Court, in its uniform and careful regard for the

interests and rights of homestead and pre-emption settlers, will not overlook.

Besides, there is no foundation geographically for the novel claim made. There was nothing in the act to prevent the company from entering Portland from any point along the valley of the Columbia River. It was not confined by the gorge in which the waters of the Columbia run for a portion of its course, but anywhere in the great watershed which constitutes the valley of the Columbia they could, by their branch, enter Portland, and the evidence shows clearly that there were several such modes of access.

No doubt the route of the branch line, under the Act of 1864, was to some extent limited and restricted; that is to say, it was to be "via *the Valley* of the Columbia River." But where in that valley? The dissenting opinion proceeds upon the view that it was a narrow valley. But where in that narrow valley was the road located? Assume (though contrary to the fact) that there was only a comparatively narrow range of choice; but, while that range of choice existed, it must be exercised before the line was definitely located.

Again, on which side of the Columbia River

was the road to be built? Does the act define this? Certainly not. The general route map of 1870, which we shall have occasion to consider hereafter, undertook to locate the line preliminarily on the north or right bank of the river; but it might just as well, perhaps better, have been located on the south or left bank of the river; for it is there that the road which was really built between the Walla Walla River and Portland—the road of the Oregon Railway and Navigation Company—was constructed.

Furthermore, according to the construction which has been heretofore adopted for this Northern Pacific Act, the question whether the road was definitely located on the north or the south bank was a very vital one, for it determined the question whether the road would run through a State or a Territory, which has been treated as furnishing the test whether the primary grant was twenty or forty miles wide.

The road certainly could not be said to be definitely located while it remained uncertain whether it was to be located on the north or south side of the river, especially if upon the determination of this question it depended whether the road was to run through a State or a Territory,

and whether the grant opposite the road was to be twenty or forty miles wide.

But it seems useless to further discuss this proposition that the words "via the Valley of the Columbia River" constituted a definite location of a line. It is true that it limits definite location within a narrower area than the provisions in respect to other portions of the road which might be anywhere, so far as the prescriptions of the act are concerned, between the 45th parallel and the international boundary, but it left a wide area of choice, and that choice had to be exercised before there could be a definite location.

Did the term "via the Valley of the Columbia River" definitely locate a line? Suppose the Northern Pacific had undertaken to exercise its right of definite location by using the same language and saying that it had definitely located its line "via the Valley of the Columbia River," and had filed a map showing a red line spread out over that whole valley, both north and south of the river. Would that have been definite location? Certainly not.

But it is said that the line must be a reasonable and direct one. Very true. That is a restriction and limitation upon definite location, but it

is not definite location. Otherwise, the terms of an act, plus this requirement, would constitute definite location of every railroad by force and operation of the act itself.

FOURTH POINT.

The Perham map of 1865 did not operate to withdraw, reserve or in any manner affect the lands in controversy or any lands opposite any of the routes sketched upon it.

It certainly was not a map of definite location, whereby alone the grant could be attached to any lands, nor was it in any sense a map fixing the general route, as required by Section 6 of the Northern Pacific act, nor was it in any sense a map authorized to be filed under that act, whereby any right of withdrawal of land could be claimed. Any executive withdrawal attempted under it would have been unwarranted and unlawful. It was the only act done by the company under the Act of 1864. It was rejected on presentation. The claim of withdrawal made thereunder was refused, and this action was approved by the department in later cases.

N. P. R. R. v. *Miller*, 7 L. D., 100.

(A) The Perham map was ineffectual for any purpose whatever. It did not conform to the act and was utterly vague and indefinite. Whereas,

the act, Section 1, authorizes the building of a road "beginning at a point on Lake Superior, in "the State of Minnesota or Wisconsin, thence "westerly by the most eligible railroad route as "shall be determined by said company, within "the territory of the United States, on a line north "of the forty-fifth degree of latitude to some point "on Puget's Sound, with a branch, via the valley "of the Columbia River to a point at or near Port-"land, in the State of Oregon, leaving the main "trunk line at the most suitable place, not more "than three hundred miles from its western termi-nus," the Perham map does not designate any one point of beginning on Lake Superior, but two, which for several hundred miles proceeding westward are independent and cross each other. Which of these was the line designated and in respect to which might or could or ought withdrawals to have been made? At the western terminus, instead of a line direct to Puget Sound, it indicates a line down the Columbia River and north to Puget Sound wholly unwarranted by the act. In this respect it was apparently a clumsy attempt to claim that unauthorized route for the company for its main line under the act. And the letter of the president which accom-

panied it, and by which it was labeled and described (Record, p. 81), describes it as designating "in red ink the general line of their railroad "*from a point on Lake Superior in the State of* "*Wisconsin*," without stating which of the two points, "*to a point on Puget Sound in Washington* "*Territory via the Columbia River*," and saying nothing about any branch, but claiming and professing to designate the unwarranted and false route to Puget Sound by the way of the Columbia River and north from the vicinity of Portland as the main line of its road.

The first section of the act authorized the company to construct its main road by the most eligible railroad route north of the 45th degree of latitude, as shall be determined by the company, to some point on Puget Sound with a branch via the valley of the Columbia River to a point at or near Portland in the State of Oregon, leaving the main trunk line at the most suitable place not more than 300 miles from its western terminus. It is impossible to tell from this map which, if any, route it would adopt at either terminus. At the eastern extremity not only were there two routes in red starting at different points on Lake Superior brought to-

gether in Montana at the point marked A on the map, but there is a still further route in black from a point near the boundary of Minnesota and Dakota to a point in Montana which is described as "*worth an examination for a railroad route.*" Further, the map declares as to the western terminus that H, K, L, M, A, B, C, D is the "*practicable railroad as surveyed by Governor Stevens.*" But there are two H, K's—one from K in Montana over the Cascade Mountains to H on Puget Sound, and one from K by way of Portland to the same point, the one being northwest from K and the other southwesterly from K along the course of the Columbia River to Vancouver, thence north to the point H. There was no effort to designate a branch line at all. There was an apparent effort to appropriate what did not belong to the company by going round by the way of Portland to Puget Sound. It is probably immaterial what the motive was for designating an alternative line of road as to the western terminus from Wallula to Puget Sound. It is perfectly obvious that under the law it was worthless and inoperative, because not locating the road one way or the other.

This Court, in *United States* v. *N. P. R. R.*

Co., 152 U. S., 284, having this map before it, appears to have condemned it as a map not authorized by the act. The act necessitated two western termini; the map made but one, and that by a route not permitted.

The Interior Department has always condemned it as worthless and inoperative under the act and as utterly void for indefiniteness.

In the *Miller* case, 7 L. D., 100, 104, Secretary Vilas said:

> "The line indicated on it is not marked with
> "sufficient definiteness to indicate through
> "what townships, even, much less sections,
> "the line of the road would pass. There is
> "not even sufficient representation of the top-
> "ographical features of the country to define
> "the location, except on portions of the line."

Even without proof of there being direct eligible routes across the Cascade Mountains, this Court, in 152 U. S., held that under the act the company was bound to locate its main line across the Cascade Mountains to Puget Sound and its branch from a point on such main line not more than 300 miles from its western terminus on the sound, via the valley of the Columbia River, to a point at or near Portland; that is, there must be two termini on the west; one somewhere on the

Sound, the other at or near Portland, and entirely disconnected except by the roundabout way of the junction of the "main" and "branch" line. The present record establishes that there are four direct eligible routes across the Cascade Mountains selected afterwards by the company and approved by the Interior Department as shown by the exhibits.

(Sen. Exec. Doc. No. 120; Record, p. 156 *et seq.*; Map of Washington Territory, Map 329, and the Postal Map 348.)

1st. A branch line of August 20, 1873; 2d. An amended branch line of 1876; 3d. Amended branch line of 1879; 4th. Line of constructed road now operated.

These lines are called branch lines because filed since the Joint Resolution of May 31, 1870, which provided for the first time that the main line should be located down the valley of the Columbia and the branch line across the Cascades.

Again, the Perham map entirely ignores the City of Portland, and its immediate connection with the East for the purposes of commerce and traffic. This Court said (152 U. S., 293):

> "It is clear that the purpose of Congress, "by the Act of 1864, was not to connect

" Portland with Puget Sound, by a road
" established upon the most direct or eligible
" route between those places; but, so far as
" Portland and its vicinity were concerned,
" to connect them with the East by a branch
" road, through the valley of the Columbia
" River, that would strike the main trunk
" line connecting Puget Sound and Lake
" Superior. There was no purpose, *by that*
" *act*, to make a grant of lands for a road to
" be located and constructed from a point 'at
" 'or near Portland' to Puget Sound."

The Perham map by its line down the Columbia River and up towards Puget Sound leaves Portland eight or ten miles away, and with the Columbia River between the line and the city. It was neither a determination nor adoption of any particular line, but an equivocal and alternative experiment setting forth two lines with a manifest purpose of leaving the company free to choose afterwards which should be its line. It violates the first rules which the Court has insisted upon as to clearness of determination of route by a map of general route.

In *Buttz* v. *Northern Pacific R. R.*, 119 U. S., 55, at page 72 the Court says:

" The general route may be considered as
" fixed when its general course and direction

" are determined after an actual examination
" of the country or from a knowledge of it,
" and is designated by a line on a map
" showing the general features of the adja-
" cent country and the places through or by
" which it will pass. *The officers of the*
" *Land Department are expected to exercise*
" *supervision over the matter so as to require*
" *good faith on the part of the company in*
" *designating the general route, and not to*
" *accept an arbitrary and capricious selec-*
" *tion of the line irrespective of the character*
" *of the country through which the road is to*
" *be constructed.*"

Throughout its whole extent, and especially at the two termini, the Perham map is nothing but an arbitrary and capricious, equivocal and alternative, designation, not amounting to a selection of line.

In *Hayes* v. *Parker*, 2 L.D., 554, page 555, considering the provisions of this section, Secretary Taylor said, in language that this Court will, we think, approve :

" The act in question provides for but one
" line of general route and one of definite
" location. It is certainly a very grave
" question whether legislative withdrawal
" operates under any preliminary map other
" than the one which the company finally

" determines shall be the settled and fixed
" general route of the road. If legislative
" withdrawals operate upon preliminary
" lines not finally fixed as lines of genera
" route, then we have in this instance a
" legislative withdrawal of a section of the
" country almost entirely different from that
" which was finally included in the lines of
" the general route."

(B) But the Perham map was rejected, and rightfully rejected by the department; which refused to make any withdrawal thereunder (and the amendment to the bill (Record, p. 20) expressly alleges that the two withdrawals made after the filing of the maps of August 4, 1870, were the only withdrawals made in Oregon upon the portion of the Northern Pacific between Wallula and Portland).

Nor can it be claimed with any sense or reason that the character of the Perham map was such as to accomplish a withdrawal, in spite of the decision of the executive officers against it. If such a result can ever be accomplished or worked by the filing of a general route map, it must, in definiteness, accuracy, legality and conformity to the grant, not only be far in advance of the Perham map, but in all respects absolutely dif-

ferent from it. The case does not present the question for decision of the effect of a presentation and filing of a proper and lawful map of general route improperly rejected by the department as working a legislative withdrawal of lands, for here not only was it obviously a wrongful and insufficient map rightfully rejected, but the company acquiesced in its rejection, not seeking or attempting to disturb or obtain a review or reconsideration of the decision of the department. It acquiesced in silence for two years, and then, on the 27th of April, 1867, it presented another map, accompanied by a letter, which showed that *the general route had not even then been determined on or adopted by the company*, and utterly ignoring the Perham map which had been filed two years before. This map and letter (Record, p. 165, Map 342) seem to be conclusive as an abandonment of the Perham map, although they related particularly to the eastern portion of the line. The map designated two routes approaching each other not nearer than twenty-five or thirty miles and neither route corresponding with those shown on the Perham map. The letter shows the location to be undetermined and wholly problematical. It says, among other things:

" In order that the line of the Northern " Pacific Railroad Company may be so lo- " cated as to interfere as little as possible " with other lines, and secure to the com- " pany its quota of land under the grant " made to it, it is desirable to know what " lands within the limits prescribed in its " charter have been disposed of, either " to railway companies or otherwise, includ- " ing such as have been withdrawn or re- " served to the Indians.

" It is not probable that the terminus of " the Northern Pacific Railroad, if placed on " the northern side of the lake, will be estab- " lished further east than Buchanan, and if " upon the south side, farther east than the " head of Chequamigon bay. Should this " latter point be selected, the line, on leaving " the lake, will probably incline somewhat " to the south—not, however, more than " about ten miles—and thence it will run by " a nearly direct course to near Crow Wing or " Fort Ripley, on the Mississippi, and thence " to near Breckenridge, on the Red River.

" Wherever the terminus may be upon the " lake, whether at either of the points named " or between them, the line will not, I think, " cross the Independent meridian, which forms " in part the boundary between Wisconsin " and Minnesota, farther north than twenty " miles north of the fifth correction line in " Minnesota, or further south than twenty " miles south of the same line.

"From this description, and referring to "the company's charter, you will be able, I "trust, to furnish to the railroad company a "sketch of such lands as are available under "their grant.

"The company, while they desire to make "the most of their land grant, will endeavor "to so locate their road as that its character "for directness between important points "and lowness of gradients shall not be in "any respect impaired."

Again, the correspondence between the Company and the Department preliminary to the filing of the general route map of August, 1870, *demonstrates that the general route had not even then been fixed, and that there was no thought of adhering to the Perham map* (see Record, p. 82).

Again, the resolution passed by the Northern Pacific board as late as July 8, 1870, only about a month before the filing of the general route map of August, proves the company's acquiescence in the rejection of the Perham map, for it directed the president of the company to cause a *preliminary location with a map of the road from Whatcom to Portland, and by the valley of the Columbia River to the mouth of the Snake River, to be filed in the office of the Secretary of the Interior* (Record, p. 130).

We have, then, this case: The United States Government by its constituted authorities in 1865 rejected the Perham map as wholly insufficient and inoperative and in no manner affecting the lands. In 1893, nearly twenty-eight years afterwards, and more than twenty-four years after the Oregon Company, relying upon its previous action, had entered upon the lands under its grant, definitely located and completely built its road, and been practically in the enjoyment of the premises for a quarter of a century, the United States files its bill to recover the lands upon the plea that its own action in rejecting the Perham map had been illegal and should now be reversed, although it had insisted upon, and the Northern Pacific Company had acquiesced in, its action for all that length of time.

The United States having rejected the Perham map in 1865, thus leaving the lands opposite thereto unwithdrawn and open to any other grantee, made the Oregon grant in 1866, which, while the lands remained in the same condition, unwithdrawn and public lands of the United States (except so far as the withdrawal of February, 1870, in favor of the O. & C. is concerned), constructed the forty miles of its road south from Portland and opposite the lands in question.

The first twenty miles was built prior to December 31, 1869, and accepted by the Commissioners on that date. On January 29, 1870, the Commissioners' report was approved by the President, and patents ordered to issue for the lands opposite thereto (all of which were still open public lands unaffected by any withdrawal). In continuation of this work and relying upon the situation as it then existed the Company went on with its construction, and prior to August 13, 1870, and before the situation was in anywise changed, except by the withdrawal of February, 1870, for its own benefit, constructed the next twenty miles of its road, thus completing the whole forty miles of railroad opposite which the lands in controversy lie. During all this time the lands opposite this forty miles remained open public lands unaffected by any withdrawal in favor of any other party, but, after February, 1870, withdrawn for the benefit of this very Company.

Can the United States, after having rejected the Perham map, refused withdrawal thereunder, and left the lands wholly open to other grantees, except so far as the withdrawal in favor of this very Oregon grant was concerned, afterwards be

heard to say that it should have accepted the Perham map; that it should have made a withdrawal for the Northern Pacific thereunder and that it will therefore take to itself the lands which it had formerly left open to the Oregon Company and refused to withdraw as against the Perham map? Can it thus reverse the whole situation which it had established and maintained prior to and during the construction of these forty miles of road?

Between private parties it would be impossible for a more immoral and unconscionable claim to be made, and if the Northern Pacific Railroad Company were now endeavoring to recover the lands from the defendants by virtue of the Perham map and the claim of its validity, and on no other ground, surely the claim would be scouted by any Court. The Northern Pacific Company might have appealed from the decision of the Commissioner rejecting the map, but it never thought of doing so. If there was any wrong done in such rejection, it was by the United States against the Company, and yet now it seeks to avail itself of its own alleged wrong.

In the case of the *United States* v. *Marshall Mining Company*, 129 U. S., 579, at page 587, the

Court, by Mr. Justice MILLER, said, alluding to a similar predicament of parties:

> "They acquiesced in the proceedings, and "made no effort to set aside the patent, or "to correct any injustice which had been "done them in the proceedings upon which "the patent had been issued, while the other "parties had full and undisputed possession "of the land.
>
> "It may be said that they could not help "themselves, and that this silence and inac- "tion on their part did not imply acqui- "escence. But they had the right to appeal "to the Commissioner of the General Land "Office from the order of the Register "and Receiver dismissing their application. "This was not done, and it never has been "done. * * *
>
> "All the errors and irregularities which "occur in the process of entering and pro- "curing title to the public lands of the "United States ought to be corrected within "the Land Department, which includes the "authority vested in the Secretary of the "Interior, so long as there are means of re- "vising the proceedings and correcting these "errors. A party cannot be permitted to "remain silent for more than eight years "after he has abandoned a contest, sub- "mitted to the decision of the matter at "issue, although it may have been errone- "ous, and then come forward in a court of

> " equity, after the title has passed from the
> " United States, and seek to correct the
> " errors which may have occurred during the
> " progress of the proceedings in the Land
> " Office."

See, also, the decision of the Court in the opinion of Mr. Justice BREWER, *United States* v. *Missouri, Kansas and Texas Ry. Co.*, 37 Fed. Rep., 68, 70, where the Circuit Court refused to cancel patents at the suit of the United States after an acquiescence of fourteen years. But this suit was brought twenty-eight years after the Commissioner rejected the Perham map, twenty-two years after the issue of the first, and sixteen years after the issue of the last, patent now sought to be canceled.

Is it now to be said that the whole Northern Pacific grant is to be readjusted from Lake Superior to Puget Sound upon the theory that a legislative withdrawal took effect opposite the lines shown on the Perham map, notwithstanding the Interior Department's utter rejection of that map or any claim thereunder?

FIFTH POINT.

The maps filed by the Northern Pacific Railroad Company in August, 1870, were maps of general route only, and the filing thereof and the withdrawals thereunder did not and could not affect the title to any lands.

The doctrine of relation has never been applied to maps of general route, nor has any hint ever been given in any decision of this Court or of the Land Office that it could be so applied. The filing of Map 333 did not attach the Northern Pacific grant to the lands in controversy, or to any specific lands, and its only legal effect was to cause the withdrawal from sale of lands opposite the route shown on the map, so as to prevent *subsequent* dispositions of them which would except them from the Northern grant in the event of the adoption by the Northern Company as its line of definite location of a line opposite the withdrawn lands and within the prescribed distance therefrom. No such definite location was ever made, and no title passed to the Northern Company whatever to any lands between Wallula

and Portland, and the grant to the Oregon Company made on the 25th of July, 1866, took effect by relation as of that date when that Company filed its map of definite location, October 29, 1869, nine months prior to the filing of these maps of general route by the Northern Pacific, and six months prior to the passage of the Joint Resolution of May 31, 1870, under and by authority of which these maps of general route were filed.

(A) As to the fact of these Northern Pacific maps of August, 1870, being maps of general route as distinguished from maps of definite location, there can be no possible room for doubt upon the record now, although, upon the hearing of the demurrer the learned Judge seems to have mistaken them for maps of definite location.

Not only do they appear upon inspection to be maps of general route, but they were never intended to be anything else. They were received and accepted by the Interior Department only as maps of general route. In very many cases in which they have come before the courts, they have been held to be such. The Land Office has always so considered them, and there was never a holding to the contrary except by Circuit Judge SAWYER in the case of *United States* v.

Northern Pacific Railroad, reported in 41 Federal Rep., 845, which was expressly reversed by this Court in 152 U. S., page 284, this Court expressly declaring, page 290, that they were maps showing the *general route* of the main line from Puget Sound.

The bill avers that these maps were maps of general route only; the answer emphasizes that averment; the proofs taken December, 1894, demonstrate that this was their character.

While the Court below found on the hearing that these maps were only of general route, yet counsel for appellee there insisted they were of definite location, and may so insist here; the question being therefore still open on this appeal, we cite the proofs.

Let us examine them.

The following references are to exhibits in the proofs taken December 13, 1894 (Record, p. 143 *et seq.*):

> Meeting of Exec. Com. of Directors N. P. Co., July 8, 1870:
>
> "Resolved, that the President cause a *pre-*
> " *liminary location* with a map of the main
> " road of the Northern Pacific Railroad
> " Company, commencing at Whatcom, on
> " Puget Sound;" thence running southerly

on the easterly side of the said sound to Portland, in Oregon, * * * to the mouth of the Snake River, &c.

This is the action of directors which resulted in the map of August 13, 1870 (Record, p. 144).

Meeting of Directors N. P. Co., October 26, 1870:

Report of the President as to map.

"The line was thus laid down on the "map as an *approximate line only*, and "with the approbation of the Secretary of the "Interior, and with the understanding that "* * * *the Company might have the privilege of changing*," &c. (Record, pp. 130–131).

Letter of Chief Engineer Johnson to Secretary Cox, August 4, 1870, advising that

"it is probable the Northern Pacific Railroad "Company may wish to vary the location "of that portion of their line," &c., and requesting suspension of action thereon (Record, p. 129).

Letter of Secretary Cox to Chief Engineer Johnson, August 5, 1870, complying with above request to suspend action (Record, p. 131).

Affidavit of President of N. P. Co., dated May 20, 1890, giving details as to map of August 13, 1870:

> " *an approximate line only of the map of the* " *general route;* * * * might be changed," &c.; this affidavit also includes copy of his report of October 26, 1870 (Record, p. 146).

Letter Secretary Cox to Commissioner General Land Office, October 12, 1870, transmitting affidavit of officers of N. P. Co. and map, changing the line in Minnesota shown on map of August 13, 1870. Affidavit dated New York, October 1, 1870 (Record, p. 134):

> " that during the period above mentioned " surveys and explorations have been made " * * * for determining its proper loca- " tion, and that on the thirtieth day of July " last * * * a written description of *an* " *approximate location* with a map or maps " duly certified was filed with the Secretary," &c. For reasons stated, they " desire to " amend their said approximate location by " substituting therefor a line or lines," &c. These changes were ratified by the Board September 29, 1870 (Record, p. 135).

Letter October 7, 1870 (Record, p. 136), Chief Engineer Johnson to Secretary Cox, inclosing map, &c., sent to Commissioner by Ex. F.

Letter Secretary Cox to Chief Engineer Johnson, October 12, 1870, acknowledging receipt of

Ex. G and inclosures, approving the change of route, &c., but hoping

> " the Company will be able to avoid the " necessity of any further changes, *except* " *upon the final definite location of the* " *route* " (Record, p. 136).

Letter President Smith to Secretary Delano, February 16, 1872, sending

> " map of the *preliminary line* of road of " this Company from the Red River of the " North " (eastern boundary of Dakota) " to " the Columbia, at the mouth of the Walla " Walla River " (Record, p. 137).

Letter from Secretary Delano to Commissioner Drummond, February 21, 1872, transmitting

> " map of the *preliminary route* of the North- " ern Pacific Railroad," in Ex. I. (Record, p. 137).

This is the map in the *Buttz* case (119 U. S., p. 55).

Certificate to map, that it

> " shows the *general route* of the 'Northern " 'Pacific Railroad,' from * * * the cross- " ing of the 'Red River of the North' * * * " to the Walla Walla River, about fourteen " hundred and forty-eight miles; * * * " the route that we anticipate will be finally " accepted for that portion of the main line," etc. (Record, p. 138).

Orders of withdrawal for that map and line (Record, pp. 138–9).

Letter of Secretary Delano to President Smith, February 21, 1872, acknowledging receipt of his letter of 16th, and "accompanying map of the preliminary route," &c. (Record, pp. 139–140).

Senate Ex Doc. 120, 2d Sess., 46th Cong. (Record, p. 156 *et seq*), shows every map of the Northern Pacific Railroad accepted by the department, and specially that the map of August 13, 1870, was of general route only; the Perham map was not included, because it was rejected and was never regarded as a proper map of line of road.

Interior Department Land Grant Statement (Record, folder 347); an official statement showing the maps of the Northern Pacific Railroad and their character; this shows the different maps of definite location for the entire road as constructed, and that there is nothing as to the line between Wallula and Portland except the map of general route of August 13, 1870.

Postal map of Washington (Record, map 348) to show constructed road of Northern Pacific Railroad, and showing a fourth "eligible route" across the Cascades; three are shown by Ex. M. (Record, map 329).

A few references to decided cases are presented on this point:

N. P. R. R. Co. v. *St. Paul & P. R. R. Co.* (26 Fed. Rep., pp. 551, 560):

> "On August 13, 1870, a map of general "route, * * * was filed. Subsequently, "and on October 12, 1870, an amended map "of general route was filed."

In same case on appeal (139 U. S., p. 1):

> "The general location of the route of the "Northern Pacific Railroad was designated "in 1869, and a map of it, approved by "the Secretary of the Interior, was filed in "the office of the commissioner of the gen- "eral land office in August, 1870. * * * "Subsequently this general route in Minne- "sota was changed, and a map corrected in "accordance with the change approved by "the Secretary of the Interior and filed on "the 8th of October, 1870; and on the 12th of "that month the Secretary ordered the with- "drawal of the lands."

Railroad v. *Herring* (110 U. S., 27):

> "On August 13, 1870, a map of the gen- "eral route of the road to * * * was filed."
>
> Same finding as to map of October 8th, 1870, and withdrawal as in 139 U. S., page 1.

Hayes v. *Parker* (2 L. D., 554) holds that the line of 1870, east of the Columbia, was not even a general route, but only a trial line; and that the

general route as to that part of the country was the map of February 21, 1872.

Trepp v. *N. P. R. R. Co.* (1 L. D., 396) holds the same.

N. P. R. R. Co. (5 L. D., 193) holds that the map of August 13, 1870, was a map of general route; and that an amended map of general route was accepted February 21, 1872.

Miller v. *N. P. R. R. Co.* (7 L. D., 100) embraces a history of all the maps of the Northern Pacific Railroad and (citing *Buttz* v. *N. P. R. R. Co.*) holds that a map of general route must be approved.

N. P. R. R. Co. v. *Flaherty* (8 L. D., 542) holds that the general route of the Northern Pacific in Montana was shown on map of February 21, 1872.

To same effect are:

Catlin v. *N. P. R. R. Co.*, 9 L. D., 423.

Randolph v. *N. P. R. R. Co.*, 9 L. D., 416.

N. P. R. R. Co. v. *Dunham*, 11 L. D., 471.

Tetreault v. *N. P. R. R. Co.*, 15 L.D., 552.

Dellone v. *N. P. R. R. Co.*, 16 L. D., 229.

N. P. R. R. Co. v. *Patterson*, 16 L. D., 343.

Cole v. *N. P. R. R. Co.*, (17 L. D., 8, p. 16): "That map (map of August 13, 1870), must be "considered * * * as a map filed to cover "the general route intended to be used by the "railroad company in Eastern Washington."

In seven opinions of Attorneys-General of the United States the same finding has been made. In a word, in all the very numerous cases in the Departments of the Interior and Justice arising out of this grant, and involving the character of these maps, not one has been acted on with any assumption other than that the maps of August 13, 1870, were of "general route."

(B) The substance of the matter already presented under our First Point renders it almost a work of supererogation to repeat the reasons and authorities for the proposition that these maps of general route, even if they could be deemed to have been filed under and by authority of the Act of 1864, which preceded the grant to the Oregon Company, are wholly ineffectual under the facts proved in this case to disturb the title of the Oregon Company or to affect in any manner its title to the land as between the United States, as grantor, and the Oregon Company, as grantee.

The act provided for a designation of general route as authority for withdrawal, and for the definite location as the means of vesting title by relation as of the date of the act.

The filing of the map of general route and the withdrawal thereunder give no title to the Company; do not attach the grant to any specific lands; do not cause the grant to embrace the lands as if inserted by description in it. Every such map, every such designation of general route, is tentative only, changeable at the will of the company before final and definite location, and may never be followed by any definite location whatever, as was the fact in the present case so far as relates to the line from Wallula down the Columbia River to Portland, or its vicinity. Being thus changeable, the Company not being held to it or bound by it, the Government, the grantor, is no more held to it or bound by it. It does not effectuate a designation of the lands to be inserted in the conveyance, which still remains, as it were, a conveyance in blank until the definite location enables the law to write the description into the deed, as this Court has over and over again said.

It has already been repeatedly held by this Court, in reference to this very act, that it con-

templated and required both a map of general route and also a map of definite location.

> "The Act of Congress not only contem-
> "plates the filing" * * * "of a map show-
> "ing the definite location of the line of its
> "road," * * * "but it also contemplates
> "a preliminary designation of the general
> "route."
>
> *Buttz* v. *N. P. R. R. Co.*, 119 U. S., 55, 71.

And again in *United States* v. *Southern Pacific R. R. Co.*, 146 U. S., 570, the Court says (p. 600):

> "Congress provided for two separate mat-
> "ters; one the fixing of the general route,
> "and the other the designation of the line of
> "definite location."

The uniform holding has been that under an approved map of general route no interest whatever in the lands passes to the Company. The clear distinction between the effect of a map of general route and a map of definite location has been so often restated by this Court as hardly to bear a reference to it on the brief.

Thus, in *Menotti* v. *Dillon*, 167 U. S., 703, 720, the Court says:

> "The filing of the map of general route
> "gave the railroad company no claim to any

" specific lands within the exterior limits
" of such route on either side of the road,
" the rule being that a grant of public lands,
" in aid of the construction of a railroad,
" is, until its route is established, in the
" nature of 'a float,' and title does not attach
" to specific sections until they are identified
" by an accepted map of definite location of
" the line of road to be constructed."

In *Northern Pacific R. R.* v. *Sanders*, 166 U. S., 620, 634, the Court says:

" The Company acquired, by fixing its
" general route, only an inchoate right to
" the odd-numbered sections granted by Con-
" gress, and no right attached to any specific
" section until the road was definitely located
" and the map thereof filed and accepted.
" Until such definite location it was compe-
" tent for Congress to dispose of the public
" lands on the general route of the road as
" it saw proper."

In *Kansas Pacific Co.* v. *Dunmeyer*, 113 U. S., 636, the Court says:

" Whatever rights accrue to the company
" from the act of filing it accrue from filing it
" there [at the Land Office]. What are those
" rights? This action does not, like the filing
" of the line of definite location, vest in the
" company a right to any specific piece of
" land. It establishes no claim to any par-

" ticular section with an odd number. It
" authorizes the Secretary to withdraw cer-
" tain land from sale, pre-emption, &c."

Again in *St. Paul, M. N. R. R. Co.* v. *Greenhalge*, 26 Fed. Rep., 563, 565, the Court said:

" The complainant took nothing by the
" withdrawal. A withdrawal passes no title.
" It only prevents other titles from accruing."

Again in *United States* v. *Southern Pacific*, 146 U. S., 570, the Court says (p. 600):

" The map which was filed on April 3,
" 1871, was simply one of general route, and
" therefore did not work a designation * * *
" to which the Southern Pacific's grant at-
" tached."

And in both the Dunmeyer case, and the St. Paul case in 139 U. S., page 1, the doctrine is reaffirmed that the only effect produced by a map of general route is to cause a withdrawal either executive or legislative, and that the effect of the withdrawal is only to preserve the then public lands as against *subsequent* claims and dispositions except such as may be permitted by the granting act. But, as has been already observed, before this map of general route was filed, the title of the Oregon Company had become perfect by its granting act, definite location and actual

construction of road, subject only to being defeated by the possibility—which never was realized—of a definite location over the same ground by the Northern Pacific, under its prior grant of 1864.

It is too well settled for argument that a filing of a map of general route confers upon the Company no interest legal or equitable in any of the land opposite the line shown upon the map. Its effective operation is merely of a negative and prohibitive character. It merely prohibits subsequent disposals of the land by prescribed methods of sale, entry or pre-emption, but does not give to or confer upon the Company any right, title or interest whatever in the lands, which can only be acquired by definite location or construction according to the various provisions of the different acts. The lands involved still remain lands of the United States. The status of the lands, so far as legal and equitable interests therein or in respect thereto are concerned, is precisely the same as before the filing of the map and the issuing of the withdrawal order.

Nothing was done or resulted from what was done, in filing a map of general route or securing a withdrawal order, except that the lands lying

within the prescribed limit opposite the designated line had ceased to be liable to sale, entry or pre-emption.

At all events, the title of the Oregon Company had already vested in the lands in controversy, and a reservation by withdrawal for the Northern Pacific which never culminated in definite location could not affect the Oregon Company's title to the land.

SIXTH POINT.

All rights accruing upon the filing of the Map of August, 1870, so far as the line west of the mouth of the Walla Walla River was concerned, depended upon the Joint Resolution of 1870, and in respect to that portion of the Northern Pacific line the Oregon Company's grant of 1866 was the prior grant. This brings the case precisely within the rule established in the Musser-Sauntry Case, 168 U. S., 604.

The map of the Northern Pacific of August, 1870, even as a map of general route, was never authorized by the Act of 1864, but only by the Joint Resolution of May 31, 1870, prior to which the title of the Oregon Company to the lands in question had become absolutely perfected by its granting act and definite location. This map was filed after and in pursuance of the authority contained in the Joint Resolution of 1870 and can find no warrant in the Act of 1864.

Under the Act of 1864 the Northern Pacific Railroad Company was authorized to build and maintain *a continuous railroad and telegraph line*

from a point on Lake Superior to some point on Puget Sound, with a branch via the valley of the Columbia River to a point at or near Portland, leaving the main trunk line not more than 300 *miles from its* (*the main line's*) *terminus.* This plan is perfectly clear. A main trunk line to Puget Sound and a branch from a point not exceeding 300 miles east of the Puget Sound terminus to a point at or near Portland.

Up to 1870 nothing in the way of construction had been done.

Perham's relation to the matter is aptly described by Jay Cooke as follows:

> "Mr. Perham had a unique idea. He pro-
> "posed to build a railroad without bonds,
> "and to obtain the capital by selling the
> "stock in small lots throughout the country—
> "to make a sort of national penny subscrip-
> "tion to build a great transcontinental rail-
> "road. Of course, Mr. Perham's Utopian
> "scheme fell through."

No substantial steps toward the construction of the road were taken until after the passage of the Joint Resolution of 1870. Except the Perham map of 1865, nothing even on paper was presented by the Company, and that map, as has already appeared, was a wholly unauthorized

map by which the Company seems to have sought to diverge from the route pointed out by the Act of 1864 and to carry *its main line by way of Portland to Puget Sound and back across the Cascade Mountains to a point on the main line in Washington Territory.*

By resolution April 10, 1869 (16 Statutes, 57), the Northern Pacific Company was authorized to extend its branch line *from Portland to Puget Sound* and to connect the same with its main line west of the Cascade Mountains in Washington, but this resolution of Congress gave no subsidy or land grant on the extension, except the mere right of way. Congress thus far kept clearly distinct as features of the railroad plan the main line direct to Puget Sound and the branch line, to a point at or near Portland, and then by the resolution of 1869 authorized an extension of the branch line from Portland to Puget Sound, but this concession of 1869 seems never to have been accepted by the Company, probably because of its lack of land grant on the extension.

So that as the matter stood prior to the passage of the Joint Resolution of May 31, 1870, the Company had no right whatever to build *its main line down the Columbia River to Portland.* The

Company had acquired no rights up to this time in any lands opposite the Columbia River except the right of selection and location if it should ever see fit to avail itself of them by definitely locating its line under the Act of 1864. It was apparent that without further legislation the whole scheme was likely to fail. Money could not be raised without the power to mortgage, which was not given by the resolution of April 10, 1869, authorizing the extension of the branch line. So Congress, taking the Northern Pacific Railroad Company as it found it, passed the resolution of May 31, 1870, entitled "A resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage and for other purposes," as a new and independent piece of legislation not enacted as, or purporting to be, an amendment of the Act of 1864, and now, for the first time, the Northern Pacific acquired the right to mortgage its property and *to build its main line to some point on Puget Sound via the Valley of the Columbia River with the new right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound.*

Meantime, however, Congress had passed the Acts of May 7, 1866 (14 Statutes, 355); July 1, 1868 (15 Statutes, 255); and May 4, 1870 (16 Statutes, 94), the latter of which acts was involved in the case in 152 U. S.; and the time for the completion of the Northern Pacific road had been extended until July 4, 1877.

This Northern Pacific Joint Resolution of 1870, we submit, presented an entirely new scheme of railroad in the locality we are considering west of the point of junction in Washington Territory. It authorized a different line entirely from the Act of 1864. That act provided for *a main line to Puget Sound*, but not via the Columbia River, because the *branch line* was to run from a point not more than 300 miles from the western terminus of the main line, down that valley to a point at or near Portland. But the Joint Resolution of 1870 provides only *for its main road to some point on Puget Sound via the Columbia River, and its branch from some convenient point on its main trunk line to Puget Sound*, irrespective of distance or locality of junction or terminus.

As to the route west of the junction point the Act of 1870 provided a wholly different plan from

that of 1864. The map of 1870, as it shows upon its face, was filed under it. It indicates the new authorized line of the main road without any indication of the branch.

Under the Act of 1864 the Company had power to designate by a map of general route a main line across the Cascade Mountains direct to Puget Sound, and to designate by a similar map a branch line along the Columbia River to a point at or near Portland only. If the map of August 13, 1870 (Map No. 333), had been filed as a map of either the main line or branch under the Act of 1864, it must have been rejected, and no withdrawal could possibly have been had or ordered under it. It was in reference to this very change of route effected by the Joint Resolution of 1870 that the Court in *U. S.* v. *Northern Pacific R. R. Co.*, 152 U. S., 284, 294, said:

> " We cannot agree that this resolution is
> " to be held, in this respect, as simply a
> " recognition by Congress of an existing
> " right, in the company, to locate and con-
> " struct a road from Portland to Puget
> " Sound, with the right to obtain lands, in
> " aid thereof, as provided in the Act of 1864.
> " On the contrary, it should be regarded as
> " giving a subsidy of lands in aid of the

> " construction of a *new* road, not before con-
> " templated, that would directly connect
> " Portland and its vicinity with Puget
> " Sound."

And it reaffirms the decision of Mr. Justice Lamar, when Secretary of the Interior, to the same effect, who said (p. 295):

> " By this resolution the designation of the
> " lines of the road were changed; that which
> " by the granting act was known as the
> " branch line (via the valley of the Colum-
> " bia River to a point at or near Portland in
> " the State of Oregon) was changed to main
> " road, or main line, and that which had
> " been designated as main line (across the
> " Cascade Mountains to Puget Sound) was
> " changed to branch line. So, by the joint
> " resolution of 1870, the company was
> " authorized to locate and construct its main
> " line via the valley of the Columbia River,
> " through some point at or near Portland,
> " Oregon, to a suitable point on Puget Sound,
> " with the privileges, grants, and duties pro-
> " vided for in its act of incorporation."

It is true that the case in 152 U. S. involved only the question of the right of the Northern Pacific Company to lands lying on the line between Portland and Puget Sound, in respect to which it had under the Act of 1864 no possibility of

acquiring any right, but the opinion of the Court is unmistakable as to the complete change of scheme, route and terms, west of the point of junction in Washington Territory worked by the Joint Resolution of 1870, and we cite it not as an authority that the Northern Pacific, without the Joint Resolution of 1870, could not have located a branch line of road down the Columbia River from Wallula to a point at or near Portland, but to establish our proposition that when, after accepting the Joint Resolution of 1870, it filed its map of general route, it filed it under and intending to avail itself of the rights given by the Joint Resolution and not under the rights conferred by the Act of 1864. In the meantime the title of the Oregon Company to the lands involved in this suit had become by its grant and definite location absolute, just as the title of the Oregon Central had become absolute in the case in 152 U. S.

Indeed, we submit with confidence that the Northern Pacific Railroad Company having done nothing whatever under the Act of 1864 by which any lands were reserved for, or acquired by, it, having up to 1870 wholly failed to prosecute its undertaking contemplated by that

Act, and having then procured the passage of the Joint Resolution of May 31, 1870, and accepted its terms and proceeded thereunder by filing its map of general route, must be conclusively deemed to have accepted the terms of the Joint Resolution as superseding and taking the place of the Act of 1864 and the grant therein contained, so far as the route west of the junction point between branch and main line is concerned.

By the Joint Resolution which it accepted it acquired additional land grant, new powers of dealing with its land grant—namely, to mortgage it—and an extension of time for building. It procured and accepted the Joint Resolution with the knowledge that since the passage of the Act of 1864, while by its supineness and inaction all the land on its route had been left open and unreserved, a grant had been made by the United States to the Oregon Company of the right to construct its road from Portland southerly to the California line, with a similar land grant which might and probably would overlap its own land grant near Portland in the event of its finally locating its own road there. And when it accepted the Joint Resolution and

the rights thereby conferred and especially the special clause of indemnity contained in the Joint Resolution of the amount of lands that have been "granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of subsequent to the passage of the Act of July 2, 1864," which must have related to the grant to the Oregon Company, which, in the meantime, had gone on and located and built its road, it could not afterwards claim that, by the subsequent filing of its map of general route or any other proceedings that it might take under the Joint Resolution, it would acquire any rights except those accorded to it by the Joint Resolution as a new and independent enactment. Indeed, the right to build the line of road and the branch authorized by the Act of 1864 was entirely abrogated and repealed by the resolution of 1870, so far as the change from branch to main line and from main line to branch and the extension are concerned. All this power and authority to build its main line and its new branch was thereafter dependent upon and derived from the resolution of 1870, and any attempt on its part, or on the part of the Government standing in its shoes by forfeiture, to attach

the map of general route filed after the acceptance of the Joint Resolution of 1870 to the Act of 1864 must and ought to fail.

SEVENTH POINT.

The provisions of the Northern Pacific Act of 1864 and Joint Resolution of 1870 concerning the grant through Territories and the grant through States respectively.

If the case did not seem entirely clear upon other grounds, we should strongly urge upon the Court the question whether, upon a proper construction of the Northern Pacific Act of 1864 and the Joint Resolution of 1870, the Northern Pacific Company would be entitled to lands in any other State or Territory than that in which its line opposite the lands was located, or, if so, whether lands forty miles in width could be acquired in a State by locating the railroad line on the territorial side of a boundary line between a State and a Territory, as was done in this case.

The grant under the Act of 1864 is of

> " every alternate section of public land not
> " mineral designated by odd numbers to the
> " amount of twenty alternate sections per
> " mile on each side of said railroad line as
> " said Company may adopt through the Ter-
> " ritories of the United States, and ten alter-
> " nate sections of land per mile on each side

" of said railroad wherever it passes through
" any State."

The Joint Resolution provides that,

" in the event of there not being *in any*
" *State or Territory in which said main*
" *line or branch may be located* at the time
" of the final location thereof the amount of
" lands per mile granted by Congress to said
" Company within the limits prescribed by
" its charter, then said Company shall be en-
" titled under the directions of the Secretary
" of the Interior to receive so many sections
" of land belonging to the United States and
" designated by odd numbers *in such State*
" *or Territory* within ten miles on each side
" of said road beyond the limits prescribed
" in said charter as will make up such de-
" ficiency on said main line or branch, except
" mineral and other lands as excepted in the
" charter of said Company of 1864, to the
" amount of the lands that have been
" granted, sold, reserved, occupied by home-
" stead settlers, pre-empted or otherwise dis-
" posed of subsequent to the passage of the
" Act of July 2, 1864."

The question which arises in this case, so far as the Act of 1864 is concerned (and independently of the legislative construction of that Act by the Joint Resolution of 1870), is whether the term "through the Territories of the United States"

is to be deemed to relate to the location of the 20 alternate sections per mile granted, or to the location of the railroad line which should be adopted by the Company. It is true that the juxtaposition of these words might seem to indicate that the location of the railroad line was referred to, but certainly the whole sense of the thing would seem to indicate that the words "through the Territories of the United States" related to the location of the granted sections, and that while a swath of 80 miles in width was to be granted in Territories a swath of only half that width was to be granted in States. There certainly could be no good reason why a location of the road as, in this instance, on the north side of the Columbia should draw 80 miles in width and a location less than a mile distant on the south side of the river should draw only 40 miles in width from substantially the same lands. This Act of 1864, sensibly construed, meant to make the location of the lands and not the location of the line the test of the width of the grant.

This seems to be made clear by the provisions of the Joint Resolution of 1870 quoted above, by which the granted lands therein referred to are limited to *the State or Territory in which the*

land is located, which was of course proper, in order that the 40-mile Territorial or the 20-mile State limit should be uniformly applicable at each particular point on the line.

It is to be remembered that when the Map of August 13, 1870, was filed, the Joint Resolution had been passed and accepted by the Company, and that it really furnished the only basis upon which any substantial action was ever taken by the Northern Pacific Railroad Company in respect to the construction of its road.

We submit that it would be a most anomalous and unreasonable construction of these provisions of law that the Northern Pacific Railroad Company, by putting its road on the north bank of the Columbia River, could draw to a limit of forty miles in the State of Oregon and forty miles in the Territory of Washington; whereas, by locating its road less than a mile further south (where the road of the Oregon Railway and Navigation Company—the only road ever constructed between the points under consideration — was actually constructed), it would draw only within a twenty-mile limit in the State of Oregon and a twenty-mile limit in the Territory of Washington.

Obviously the location of the lands, and not

the location of the line, was to control, and the belt of lands was to be found either wholly in a State or wholly in a Territory; if the lands within the prescribed limits of the State or Territory were insufficient a further indemnity belt ten miles in width was provided under the Joint Resolution of 1870.

EIGHTH POINT.

Whatever may be the judgment of the Court with respect to the claims and rights of the Oregon Company, no judgment should be rendered against the defendants Hurlburt and Andrews, who are shown by the bill to be bona fide holders for value and without notice under conveyances from the company dated respectively in 1879 and 1880, and to have been in possession ever since and made valuable improvements thereon; nor should any judgment be rendered which could prejudicially affect the rights of the other purchasers from the Oregon Company of any of the lands involved in the suit.

Of the 220,000 acres claimed in the suit, 61,336 acres are shown to be thus held by *bona fide* purchasers.

Surely, the Act of 1896 must protect these *bona fide* purchasers from any cancellation of their deeds held under the patents. The Act of 1896 expressly provides that no patent to any lands held by a *bona fide* purchaser shall be affected or annulled, but the right and title of such purchasers is

thereby expressly confirmed. This act would seem to have been passed with direct and immediate reference to cases like the present, and as a remedial statute it necessarily applies to pending cases and controls the final judgment therein.

The decree of the Circuit Court, rendered September 9, 1895, vacated and annulled the several patents issued to the Oregon and California Railroad Company for the lands in controversy herein, or any of them, and adjudged that the deeds to Hurlburt and Evans respectively were null and void and canceled them.

The decree of the Circuit Court of Appeals, rendered October 19, 1896, reversed the decree below and directed the dismissal of the bill.

By the Act of March 2, 1896, it is provided and declared, as has been seen, that no patent to any of the lands herein, held by any *bona fide* purchasers, shall be vacated or annulled, and the right and title of such purchasers, and every of them, in and to such patented lands is confirmed by the United States.

This Court will act upon the provisions of law in the Act of 1896, in respect to the rights of *bona fide* purchasers of the lands, or any of them, involved in this suit, agreeably to the well-settled

principles in regard to such competent legislation passed pending the final determination of a cause.

Pennsylvania v. *Wheeling Bridge Co.*, 18 How., 421.
The Clinton Bridge, 10 Wall., 454.
Ex parte McCardle, 7 Wall., 514.
Railroad v. *Grant*, 98 U. S., 399.
U. S. v. *The Peggy*, 1 Cranch, 103.
Yeaton v. *U. S.*, 5 Cranch, 281.
Sch. Rachel v. *U. S.*, 6 Cranch, 329.
State v. *Norwood*, 12 Md., 195.

The precise question seems to be disposed of by the decision of the Court in this case of *United States v. Winona, &c., R. R.*, 165 U. S., 463, in which Mr. Justice BREWER, speaking for the Court and referring to the Act of 1896, says, at pages 476–7:

> " It is true this act was passed after the " commencement of this suit—indeed, after " the decision by the Court of Appeals—but " it is none the less an act to be considered. " There can be no question of the power of " Congress to terminate, by appropriate legis- " lation, any suit brought to assert simply " the rights of the Government. This suit " was instituted by the Attorney-General in " obedience to the direct command of Con- " gress, as expressed in the Act of 1887, and " Congress could at any time prior to the final " decree in this Court direct the withdrawal

" of such suit; and it accomplishes practically
" the same result when, by legislation within
" the unquestioned scope of its powers, it
" confirms in the defendants the title to the
" property which it was the purpose of the
" suit to recover. * * * It [the Act
" of 1896] not only declares that no patents
" to any lands held by a *bona fide* purchaser
" shall be vacated or annulled, but it confirms
" the right and title of such purchasers.
" Given a *bona fide* purchaser, his right and
" title is confirmed, and no suit can be main-
" tained at the instance of the Government
" to disturb it."

And at page 481:

" Our conclusion is that these acts operate
" to confirm the title to every purchaser from
" a railroad company of lands certified or
" patented to or for its benefit, notwithstand-
" ing any mere errors or irregularities in the
" proceedings of the land department, and
" notwithstanding the fact that the lands so
" certified or patented were, by the true con-
" struction of the land grants, although
" within the limits of the grants, excepted from
" their operation, providing that he purchased
" in good faith, paid value for the lands, and
" providing, also, that the lands were public
" lands in the statutory sense of the term, and
" free from individual or other claims."

This Court, in the leading and celebrated case of the *Wheeling Bridge* (*supra*), on May 27, 1852

made a decree declaring the bridge a nuisance, and directing the obstruction to be removed, but on August 31, 1852, Congress passed an act declaring the bridge to be a lawful structure, and "shall be so held and taken to be, anything in the law or laws of the United States to the contrary notwithstanding."

This Court, on motion for process to enforce its decree, held that, by the Act of 1852, the bridge had ceased to be a nuisance, and denied the motion.

Mr. Justice NELSON, speaking for the Court, said (p. 430):

> "So far, therefore, as this bridge created "an obstruction to the free navigation of the "river, in view of the previous acts of con- "gress, they are to be regarded as modified "by this subsequent legislation; and, "although it still may be an obstruction in "fact, is not so in the contemplation of "law. * * *
>
> "But it is urged, that the act of congress "cannot have the effect and operation to "annul the judgment of the court already "rendered, or the rights determined thereby "in favor of the plaintiff. This, as a "general proposition, is certainly not to "be denied, especially as it respects adjudi- "cation upon the private rights of parties.

"When they have passed into judgment, "the right becomes absolute, and it is the "duty of the court to enforce it.

"The case before us, however, is distin- "guishable from this class of cases, so far "as it respects that portion of the decree "directing the abatement of the bridge. Its "interference with the free navigation of the "river constituted an obstruction of a public "right secured by acts of congress. * * *

"Now, we agree, if the remedy in this "case had been an action at law, and a judg- "ment rendered in favor of the plaintiff for "damages, the right to these would have "passed beyond the reach of the power of "congress. It would have depended, not "upon the public right of the free naviga- "tion of the river, but upon the judgment "of the court. The decree before us, so far "as it respects the costs adjudged, stands "upon the same principles, and is unaffected "by the subsequent law. But that part of "the decree, directing the abatement of the "obstruction, is executory, a continuing de- "cree, which requires not only the removal "of the bridge, but enjoins the defendants "against any reconstruction or continuance. "Now, whether it is a future, existing or "continuing obstruction depends upon the "question whether or not it interferes with "the right of navigation. If, in the mean- "time, since the decree, this right has been "modified by the competent authority, so

"that the bridge is no longer an unlaw-
"ful obstruction, it is quite plain the de-
"cree of the court cannot be enforced.
"There is no longer any interference with
"the enjoyment of the public right incon-
"sistent with law, no more than there would
"be where the plaintiff himself had con-
"sented to it, after the rendition of the
"decree. * * *

"And is it not equally clear that the right
"to maintain it, if not abated, existed from
"the moment of the enactment?"

In the case of the *Clinton Bridge* (10 Wall., 454, 462) the Act of Congress was passed pending the suit in the Circuit Court.

Mr. Justice NELSON said (p. 463):

"In the present case the act of Congress
"having passed pending the suit, it gave the
"rule of decision for the court at the final hear-
"ing upon the same principle that the act
"in the Wheeling Bridge case staid the
"execution of the decree directing its abate-
"ment. The court say in that case that if
"the remedy had been an action at law, and
"a judgment rendered in favor of the
"plaintiff for damages, the right to these
"would have passed beyond the power of
"Congress."

In the case of *Railroad* v. *Grant*, 98 U. S., 398,

a writ of error was sued out December 6, 1875, the Supreme Court having jurisdiction of cases in which over $1,000 were involved. February 25, 1879, Congress raised the jurisdictional amount to $2,500. Held, that the writ should be dismissed, jurisdiction having been taken away.

The Court, citing authorities, said it was (p. 401)

> " well settled that if a law conferring juris-
> " diction is repealed without any reservation
> " as to pending cases, all such cases fall with
> " the law."

The pertinent doctrine was declared by the Court, speaking by Chief-Justice MARSHALL, in the early case of *The Peggy* (1 Cranch, 103), where the convention with France of December 21, 1801, after the decree of condemnation in the Circuit Court, and pending the case in this Court, was held binding upon the Court, and to require the reversal of the decree below.

The Chief-Justice said (p. 109):

> " It has been urged * * * that the
> " Judges can only inquire whether the sen-
> " tence was erroneous when delivered, and
> " that if the judgment was correct, it cannot
> " be made otherwise by anything subsequent
> " to its rendition. * * *

"Yet to condemn a vessel, the restoration "of which is directed by a law of the land, "would be a direct infraction of that law, "and, of consequence, improper.

"It is in the general truth that the prov- "ince of an appellate court is only to in- "quire whether a judgment, when rendered, "was erroneous or not. But if, subsequent "to the judgment and before the decision of "the appellate court a law intervenes and "positively changes the rule which governs, "the law must be obeyed, or its obligation "denied. If the law be constitutional, and of "that no doubt in the present case has been "expressed, I know of no court which can "contest its obligation." * * *

In the case of *State* v. *Norwood* (12 Md., 195) the Stamp Act having been repealed, and all unstamped contracts having been declared valid by the Legislature, it was held to be the duty of an appellate court to reverse the decision of an inferior Court made before the repeal, excluding evidence of an unstamped contract.

The operation of the Act of March 2, 1896, cannot, of course, be affected by the principles upon which effect was denied to the legislation before the Court in *U. S.* v. *Klein* (13 Wall., 128), by which Congress passed the limit separating the legislative from the judicial power, and

also infringed the constitutional power of the Executive.

In that case the Court said at p. 146:

> " We do not at all question what was de-
> " cided in the case of *Pennsylvania* v.
> " *Wheeling Bridge Co.* In that case, after
> " a decree in this Court that the bridge, in
> " the then state of the law, was a nuisance
> " and must be abated as such, Congress
> " passed an act legalizing the structure and
> " making it a post-road; and the Court, on a
> " motion for process to enforce the decree,
> " held that the bridge had ceased to be a
> " nuisance by the exercise of the consti u-
> " tional powers of Congress, and denied the
> " motion.
>
> " No arbitrary rule of decision was pre-
> " scribed in that case, but the Court was left
> " to apply its ordinary rules to the new cir-
> " cumstances created by the act."

The claim has been asserted by the United States that no one is to be deemed or considered a *bona fide* purchaser within the meaning of the Act of 1896, except persons who are *bona fide* purchasers without actual or constructive notice of error in the action of the Interior Department in issuing patents or certifying lands — that is to say, purchasers are to be charged (constructively of course) with knowledge of every fact appear-

ing of record in the Interior Department, and with accurate knowledge as to the precise legal effect and operation of the various Acts of Congress, which have been the subject of such varying and divergent views in the Interior Department, and so much discussion and difference of opinion before and in the Courts of the United States.

This view, of course, necessarily involves completely setting at naught and disregarding the intention and purpose of Congress in adopting this remedial legislation in reference to the rights of *bona fide* purchasers, nor does it rest at all upon a correct or reasonable interpretation of the language of the statutes, as is clearly shown by the opinion in the *Winona* case above cited.

The Court is very familiar with the questions which have been so much litigated before it as to the classes of cases in which *bona fide* purchasers of patented lands without notice acquired good title as against the United States. It is familiar with the questions discussed in that connection as to the extent to which purchasers of patented lands are to be deemed to be charged with constructive notice of records in the Interior Department, or with accurate knowledge as to the correct

legal interpretation of statutes involved. It is also familiar with the questions which have been there discussed as to the cases in which the action of the Interior Department, though erroneous, was within the jurisdiction of the department, and those cases in which the action of the Interior Department was without or beyond the jurisdiction of the department, and therefore was to be treated as wholly inoperative and void.

The purpose of Congress in its remedial legislation in respect to *bona fide* purchasers, in the Acts of 1887 and 1896, seems to be clear and obvious. It was not adopted for the purpose of perpetuating as against purchasers of patented or certified lands these controversies, predicated upon the application of legal principles affecting the extent or limits of the authority or jurisdiction of the Interior Department or equitable principles applicable to the cases of *bona fide* purchasers without notice, but it was to establish in favor of purchasers of lands which had been theretofore patented or certified by the United States the clear principle that if their purchases had been made honestly and in good faith for the purpose and with the expectation of acquiring title to the property, their titles should stand confirmed, and

the United States would look alone to such remedies as might be reserved by it against the companies to or in favor of which patents or certifications had been executed. The whole purpose of the legislation was to relieve the purchaser himself from the controversies and contestations which had necessarily arisen in connection with the application of existing legal and equitable principles to the cases of transferees of lands which had been erroneously patented or certified by the United States.

The theory of the Government now seems to be that this remedial legislation, which is, of course, to be liberally construed, should be effaced and obliterated, and that no one should be now entitled to claim the benefit of these statutes as *bona fide* purchasers, except such purchasers as under pre-existing rules and principles, as recognized or established by the decisions of this Court, were entitled to keep the land, notwithstanding the erroneous action of the Interior Department in patenting or certifying it.

In view of the decision in the Winona Railroad Case, 165 U. S., 463, discussion of this subject seems to be hardly requisite; the purpose of the remedial legislation seems

perfectly clear, and the meaning of the language employed conforms with that purpose.

As the Court very well knows, equitable rights were held to attach in certain classes of cases heretofore considered by this Court in favor of persons who were to be deemed to be *bona fide* purchasers of the land without notice of the errors made by the Interior Department in patenting and certification. The Statute of 1896, as well as the Statute of 1887, wholly ignores the element of notice, and extends the benefits of their provisions to all persons who are *bona fide* purchasers; that is to say, to honest purchasers, purchasers in good faith, without reference to the question of notice, except so far as actual notice might affect the question of good faith. No question of constructive notice as to records in the department, or constructive notice of the effect and operation of statutes as correctly construed, is applicable in the case of the *bona fide* purchasers in whose favor this remedial legislation has been adopted. If there has been *bona fides*, if the purchase has been made honestly—"without knowledge of wrong or error"—with the purpose and in the expectation of acquiring title—that

determines the whole question, and no residuum of controversy is left as to constructive notice or theoretical knowledge of the contents of the records of the Interior Department, or theoretical presumption of knowledge of the law as it may be declared by this Court.

Measured by these standards, the evidence in this case shows that not only Hurlburt and Andrews, but all the purchasers of these lands from the Company, were *bona fide* purchasers of the lands involved, and we submit that this Court should so hold, and recognize the confirmation of these titles established by the Act of 1896.

The patents so far as they relate to lands which are held by *bona fide* purchasers, cannot be vacated or annulled by a decree in the present suit, and any and all patented lands involved in this suit held by such *bona fide* purchasers should in any event be expressly excepted from any decree otherwise vacating or annulling any such patents.

These suggestions in respect to the effect and operation of the Act of 1896 upon their lands are submitted on behalf of Hurlburt and Andrews and all the numerous purchasers of lands involved in this suit.

NINTH POINT.

The decree of the Court below should be affirmed with costs.

JOSEPH H. CHOATE,
LEWIS E. PAYSON,
CHARLES H. TWEED,
Of Counsel.

No. 52.

Brief of Payson & Tweed for Appellees

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

Filed April 13, 1899.

No. 52.

THE UNITED STATES,
Appellant,

vs.

THE OREGON AND CALIFORNIA RAILROAD COMPANY ET AL.,
Appellees.

ADDITIONAL BRIEF FOR APPELLEES.

LEWIS E. PAYSON,
CHARLES H. TWEED,
Of Counsel for Appellees.

C. G. Burgoyne, Walker and Centre Streets, New York.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 52.

THE UNITED STATES,
Appellant,

vs.

THE OREGON AND CALIFORNIA RAILROAD COMPANY ET AL.,
Appellees.

ADDITIONAL BRIEF FOR APPELLEES.

The necessity for presenting this additional brief on behalf of the appellees arises from the following facts :

A printer's proof of part of the brief for appellant was served on the appellees on Wednesday, 5th inst., after this case had been set for hearing on that day.

On the evening of the 6th inst., by letter from the Solicitor General, the appellees were notified of an additional point to be made and argued in the brief, which now appears as Point XIV. of Appellant's Brief, page 83.

The printed brief for appellant was handed to appellees on the 7th inst.; but anticipating that the case might possibly be reached for argument by the 7th, the brief which had been prepared on behalf of

the appellees upon the case generally, as argued below, was printed without opportunity for reply therein, either to the additional Point XIV. made for the first time here, in appellant's brief, or to the other portions of that brief.

This statement is in no wise made in criticism of the Solicitor General (who has shown us every courtesy in connection with the case), but simply in explanation of our presenting an additional brief at all.

In reply to the additional Point XIV. of appellants' brief, the following suggestions are submitted.

I.

The Sixth Point in our original brief (p. 138) is a complete answer to Point XIV. in the brief for the United States.

We have there shown that all rights accruing upon the filing of the Northern Pacific maps of August 13, 1870, so far as the line west of the mouth of the Walla Walla River was concerned, depended upon the Joint Resolution of 1870, and, in respect to that portion of the Northern Pacific line, the Oregon Company's grant of 1866 was the prior grant; which brings the case precisely within the rule established in the Musser-Sauntry case, 168 U. S., 604.

II.

But even if that were not the case, and the Northern Pacific grant should, even in respect to that portion of the road, be treated as being the prior grant, still

(there having been no definite location under the Northern Pacific grant) the title of the Oregon and California Railroad Company to the lands in its indemnity list patents is good.

At the date of the withdrawal for the Oregon Company under withdrawal order of January 31, 1870, the lands in suit were clearly "public lands" in the broadest sense of the words.

By the action of the Land Department in making this withdrawal, all the lands within its terms (which included all the lands in suit) were withdrawn for the benefit of the Oregon Company, and thereby became "reserved lands" in all that that term implies.

The act of the Secretary was in effect a reservation.

N. P. R. R. Co. vs. Musser-Sauntry, &c., Co., 168 U. S., 604, and cases cited.

At the date of this withdrawal the rights of the Oregon Company, as to lands in place, were fully fixed, as between it and the United States, by its map of definite location of October, 29, 1869.

Losses of land "in place" were then ascertainable, and the orderly administration of the Oregon granting act required just what was done; viz., a withdrawal of all "public lands" affected by the grant.

It will be remembered, as we have shown, that up to this date no act of designation of either general route or definite location had been performed by the Northern Pacific Company, which in any way affected or could affect these lands, nor had any part of these lands been in any wise withdrawn under the Northern Pacific grant. So, as they still remained "public lands" in every sense of the words, they were, by Executive order of January 31, 1870, duly "withdrawn" for the benefit of the Oregon Company, and thus became "reserved lands," and subject to selection by the Oregon Company for its losses in its primary limits.

It does not appear by the record in the case when the *selections* were made and approved by the Secretary, but of course they were made and approved before the patents issued.

Non constat, but that the selections were made and the lists approved before August 13, 1870, the date of the map of general route of the Northern Pacific Company.

If so, any question involved in this suit is obviously eliminated, for, when the selections had been made and approved, title passed to the selecting company, and they could not be thereafter affected by a mere map of general route, nor any attempted withdrawal thereunder; certainly nothing short of a definite location under a prior grant could affect them; and no definite location was ever made by the Northern Pacific Company opposite to these lands.

But assuming that the selection by the Oregon Company was *subsequent* to August 13, 1870, it was none the less of lands theretofore placed in reservation for its benefit, and which could only be taken away from it, if at all, by definite location under a prior grant; which never took place.

The necessity for definite location to attach a grant to any specific lands, and the long established principle that a map of general route and a withdrawal thereunder do not in any wise affect the title to any specific lands, are fully discussed in the First Point (pp. 58-93) and the Fifth Point (pp. 122–137) of our original brief in this cause, and need not be further discussed in this connection.

III.

But even if it should be held that by reason of the filing of the Northern Pacific Maps of August 13, 1870, title to the patented lands within the indemnity belt of the Oregon Company did not vest in that company upon their original selection, nevertheless the patents for these indemnity lands will not be vacated, as the company since the passage of the Northern Pacific Forfeiture Act is entitled to perfect its title thereto by selection, and the Court will not cancel a patent made upon a selection which may have been unauthorized at the time when it was made if such selection is now authorized.

A. If it could be shown that the company may not have been entitled to select these lands when they were selected, should they be forfeited if in fact it is entitled to select them now? If the company is entitled to select and receive a patent for these very lands now, should the old patent be canceled? Must not the Government show that the patent to be canceled operates in some way to its detriment?

It is suggested with respect to these patented indemnity lands that, to entitle the Government now to a cancellation of a patent for the lands, it is not sufficient for the United States to show that the selection of the lands, as made before the passage of the Forfeiture Act, was erroneously approved by the Land Department, but it must also show that the Government has been *injured* in some way by reason of the selection and patenting of the lands to the company; and, if the company is now entitled to select and secure a patent for the same lands in its indemnity limits, it is difficult to see that the Government has sustained any injury from the patenting of these lands, and it is submitted that the patent should not now be canceled.

Lee vs. Johnson, 116 U. S., 50.
California vs. San Pablo, etc., R. R., 149 U. S., 314.

B. The right of the Oregon Company (if they had not already been patented to it) to select these lands within its indemnity limits subsequent to the passage of the Northern Pacific Forfeiture Act is beyond all doubt and question.

In Ryan vs. Central Pacific R. R. Co. (99 U. S., 382) the land at the date of the railroad grant was within the limits of a Mexican grant claim, but after the Mexican grant had been declared invalid the railroad company selected it under the indemnity provisions of its grant, and the land was patented to the company. The suit was prosecuted by the United States to cancel this patent.

The decision of the Supreme Court of the United States was rendered at the October Term, 1878. The Court said :

"The railroad company had not and could not have " any claim to it until specially selected, as it was, for " that purpose. It was taken to help satisfy the grant " to the extent that the odd sections originally given " failed to meet its requirements. When so selected " there was no Mexican or other claim impending over " it. It had ceased to be *sub judice*, and was no longer " in litigation. It was as much 'public land' as any " other part of the national domain. * * * The " Mexican claim when condemned lost its vitality. " From that time, as regards the future, it ceased to be " a factor to be considered, and was in all respects as " if it had never existed. In this state of things the " appellee acquired its title, and that title is inde- " feasible."

So here, when the land was restored to the public domain, the Northern Pacific grant and withdrawal ceased to be factors to be considered and the *status* of the land was in all respects the same as if there had never been a grant to or withdrawal for the Northern Pacific Company.

After the decision in the Ryan case the Interior Department conformed its action and decisions therewith.

Land excepted from withdrawal by the existence of a pre-emption claim is not excluded from subsequent selection, if at the date of such selection such claim has expired and been abandoned.

C., M. & St. P. Ry. Co. vs. Amundson, 8 L. D., 291.
Hensley vs. N. P. R. R. Co., 12 L. D., 19.
N. P. R. R. Co. vs. Templeton, 27 L. D., 543.

A tract of land is not excluded from indemnity selection by reason of being within the *primary* limits of another grant, if it is in fact vacant public land at date of selection and otherwise subject to such appropriation.

Allers vs. N. P. R. R. Co., 9 L. D., 452.
N. P. R. R. Co. vs. Halvorson, 10 L. D., 15.
N. P. R. R. Co. vs. Moling, 11 L. D., 138.
N. P. R. R. Co. vs. Bass, 13 L. D., 201.
St. P., M. & M. Ry. Co. vs. Munz, 17 L. D., 288.

Additional Suggestions in Reply to Appellant's Point V.

In reply to Appellant's Point V. (p. 28), we submit the following suggestions in addition to those presented in our original brief at page 99.

Appellant's Point V. is as follows:

" The words ' via the valley of the Columbia River, to " a point at or near Portland, in the State of Oregon,' " used in the Act of July 2, 1864, locates the so-called " branch line with sufficient certainty to identify the " lands granted in aid of its construction, and thus " preclude the junior grant in 1866 to the Oregon and " California from attaching."

That is to say, that by the use of the words "via "the valley of the Columbia River," the granted lands under the Northern Pacific act were identified, so that the *title* to these lands of necessity vested, by operation of the act itself, in the Northern Pacific Railroad Co.

This is certainly novel, not to say startling. It ignores the plain provisions of the act, and the construction put upon it in numerous cases in this Court, notably the Buttz Case, 119 U. S., 55, that the statute contemplates two maps, one of general route, to protect the company, and the other of definite location, by which, and by which *only*, can the lands be identified so that title will attach.

Equally it ignores the same principle announced in every land grant case decided by this Court, where the question of initiation of title and identification of lands has been considered.

The proposition is that the line is self-locating, by the act.

The act provides that the line shall be selected and adopted by the company.

By every rule the location (whether general or definite) of a line under a railroad land grant must be the act of the company, and no identification of tracts can be had until a formal map of definite location of the line, based on surveys and tied to Government surveys or natural objects, is presented and approved.

With the map (No. 329) facing page 163 of the Transcript of Record before him, where would counsel say the line, as established by the act, would be?

On the north bank of the river? And where would it cross to reach Portland?

On the south bank? And where would it cross to reach the main line?

Or would it take either of the two eligible routes in the valley, north of the river, testified to by Haversham (pp. 122, 124, 127)?

What officer of the Government is authorized by the

act to say, or what officer could say, whether the company would prefer to locate the line in Washington Territory and claim a grant 80 miles wide, or locate it in Oregon and claim only a grant 40 miles wide ?

Again, the act provides that the branch shall leave "the main trunk line at the most suitable place not "more than 300 miles from its western terminus."

Does the act fix either point—"the most suitable "place" or "the western terminus" ?

Clearly, the fixing of these points requires human judgment and determination. The act provides that it shall be done by the company, and it is impossible that it could be otherwise done under the act and the uniform rules of construction of these grants.

Again, on page 31, it is said the gorge of the Columbia River is at "no place more than six miles "wide."

That is the width of a township under regular survey, having 23,040 acres. Where, in the township, does the act locate the road ? It would make a difference of thirty townships in the Northern Pacific withdrawal in Oregon, if the line should be upon one, rather than the other, side of this gorge.

Again, on page 32, it is said : "It followed from this, "that the road would be inevitably located on the "north side of the Columbia River."

Why would it, by the act ? Most certainly some person must choose, whether it would be better to locate in a Territory, and claim a grant 80 miles wide, or in a State, and be content with one 40 miles wide.

As a matter of fact, the line subsequently located and constructed by the Oregon Railway and Navigation Company was on the south side of the river.

The uncertainty of all these situations shows clearly the absurdity of the point being considered.

Again, it is said (pp. 32 and 34) that existing natural conditions are such that notice was given to the Oregon and California Company that the lands in controversy were necessarily appropriated for the Northern Pacific Company, because the latter company could not reach a point at or near Portland without taking these lands under its grant.

Nothing could be more erroneous.

If your Honors will kindly take the map (No. 329), facing page 163 of the record, "Washington Territory," and the map (No. 350), facing page 169, Defendants Exhibit 2, and Haversham's evidence (pp. 122, 124, 127, 128), it will be perfectly apparent that there are two eligible railroad routes, feasible and practicable, from Wallula, or Pasco (the present point of departure of the Cascade Branch of the Northern Pacific), *via* the valley of the Columbia, in its main watershed, through easy passes in the mountains northeast of Portland as shown on the first-named map, and thence south via Vancouver, crossing the Columbia there; thence due south to Portland; either of these routes being adopted, not an acre of the land involved in this suit could have been taken by the Northern Pacific.

That Vancouver would be a suitable place for a crossing of the Columbia River is shown by the proofs that the Union Pacific Railroad Company have there constructed piers in that river for a bridge. The line of such road, by either of the routes described by Haversham, would reach Vancouver by a sweep round from the north, so that the line for 15 or 20 miles would be practically north and south; thence across the river, due south to a point at or near Portland, some eight miles more, making practically 25 miles of north-and-south road from Portland north.

Now, how would that grant be adjusted? The rule has been uniform in the Interior Department since the Illinois Central grant in 1850. The lateral limits are parallel to the line of road, following practically all its sinuosities by tangents to arcs of circles, the radius

being the width of the grant on each side of the line. This process fixes the lateral or side limits.

The line which marks the end of the grant at the end of the constructed road, or end of map of definite location, is called the "terminal line."

This terminal line is always at right angles to the end of the line of road, as shown by the map of definite location.

United States vs. Burlington, &c., R. R. Co., 98 U. S., 334.
United States vs. Oregon & California R. R. Co., 164 U. S., 526.

Look at Defendant's Exhibit Q, where the adjustments of two different grants by the Interior Department are shown.

The Oregon Central grant, where a large curve is made to the west of, and as the road approaches Portland; the terminal line, at right angles, at Portland.

Then the Oregon and California grant involved in this suit. The east and west "terminal line" at Portland, at right angles to the end of the map of definite location and constructed road, marks the northern limit of this grant.

Now, with the same map before your Honors, bring down the Northern Pacific line, as supposed under Haversham's evidence, from Vancouver, which is due north from Portland, the "terminal line" of the Northern Pacific grant would be an exact east and west line "at or near Portland," and every acre of land in dispute in this suit would lie south of it, and not affected by it.

This is as clear as that two plus two equal four, and disposes of the argument as to the necessary appropriation of the Oregon Company's land in case of building a road under the Act of 1864, to a point at or near Portland, via the valley of the Columbia River.

Respectfully submitted,

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